Reconciliation at the Border of Public and Private Law: Rethinking Contract Principles in the Context of Impact and Benefit Agreements

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Abstract

Over the past decade, corporate developers have increasingly sought to conclude Impact and Benefit Agreements ("IBAs") with Indigenous groups when undertaking resource projects on traditional lands. Despite this development, significant concerns have been raised about the nature and scope of Indigenous consent, as well as the substantive deficiencies within IBAs. However, less has been written about how legal principles derived from contract law would apply to IBAs in the event of a dispute before an arbitrator or a judge. This article therefore considers the ways in which specific contractual principles can be reconceptualized for IBA disputes. First, it examines the relationship between IBAs, self-determination, and contract law itself. Second, it explores how such agreements depart from traditional commercial contracting: IBAs exist in the shadow of constitutional dynamics and legal pluralism, while balancing a range of sociocultural purposes that cannot be reduced to commercial norms. Third, the article analyzes how principles relating to contractual interpretation and good faith can be applied to give effect to the careful equilibrium at the heart of an IBA. Ultimately, the article concludes that IBAs are, in effect, sui generis contracts that differ in fundamental ways from ordinary forms of contracting. Consequently, adjudicators must adopt a tailored approach to contract law principles that incorporates Indigenous perspectives and that remains sensitive to the dynamics of IBAs.

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Reconciliation at the Border of Public and Private Law: Rethinking Contract Principles in the Context of Impact and Benefit Agreements

LOGAN STACK¹

Over the past decade, corporate developers have increasingly sought to conclude Impact and Benefit Agreements ("IBAs") with Indigenous groups when undertaking resource projects on traditional lands. Despite this development, significant concerns have been raised about the nature and scope of Indigenous consent, as well as the substantive deficiencies within IBAs. However, less has been written about how legal principles derived from contract law would apply to IBAs in the event of a dispute before an arbitrator or a judge. This article therefore considers the ways in which specific contractual principles can be reconceptualized for IBA disputes. First, it examines the relationship between IBAs, self-determination, and contract law itself. Second, it explores how such agreements depart from traditional commercial contracting: IBAs exist in the shadow of constitutional dynamics and legal pluralism, while balancing a range of sociocultural purposes that cannot be reduced to commercial norms. Third, the article analyzes how principles relating to contractual interpretation and good faith can be applied to give effect to the careful equilibrium at the heart of an IBA. Ultimately, the article concludes that IBAs are, in effect, *sui generis* contracts that differ in fundamental ways from ordinary forms of contracting. Consequently, adjudicators must adopt a tailored approach to contract law principles that incorporates Indigenous perspectives and that remains sensitive to the dynamics of IBAs.

¹ Logan Stack is an associate at Conway Baxter Wilson LLP/s.r.l. The author wishes to thank Professor Helge Dedek for his invaluable support, the anonymous reviewers for their thoughtful feedback, and the members of the Osgoode Hall Law Journal’s Editorial Board for their hard work throughout this process.
MAJOR RESOURCE PROJECTS CONTINUE to be a source of significant tension between governments, corporations, and Indigenous communities. From protests in opposition to the construction of the Coastal GasLink pipeline on Wet’suwet’en territory to concerns about the Kudz Ze Kayah mine project in Yukon, recent tensions have reinforced that, despite increased public discussion of reconciliation.


between Indigenous and non-Indigenous communities, Indigenous interests continue to be neglected and sidelined by both public and private actors in the area of resource development. Nevertheless, the establishment of the Crown’s duty to consult, coupled with Indigenous protests and extra-legal action, appears to have had some influence on corporate approaches to resource development: Project proponents now commonly engage with Indigenous communities through a contractual instrument known as an Impact and Benefit Agreement (“IBA”). Despite the scrutiny and criticism that the IBA regime has received, hundreds of IBAs have been implemented in Canada.

IBAs come in many forms and their content varies widely. However, some frequent elements can be discerned. These include funding for Indigenous communities and services, whether as a set payment, a portion of revenues, or both; the establishment of consultation and committee structures to monitor the project’s evolution and the agreement’s implementation; education, training, and employment opportunities for Indigenous workers, alongside anti-discrimination codes; policies ensuring priority for Indigenous businesses to provide project-related services; environmental mitigation measures; rules relating to access to the territory by settlers and members of the Indigenous community; and dispute resolution mechanisms involving mediation and


5. For a critical examination of the shift in corporate practices, see e.g. Tyler McCreary, “Historicizing the Encounter Between State, Corporate, and Indigenous Authorities on Gitxsan Lands” (2016) 33 Windsor YB Access Just 163 at 188-95, DOI: <https://doi.org/10.22329/wyaj.v33i3.4896>; see also Dianne Lapierre, Corporate Rationales for the Use of Impact and Benefit Agreements in Canada’s Mining Sector (MA Thesis, University of Guelph, 2008) [unpublished]. The precise number remains difficult to identify given the use of confidentiality clauses. However, there appear to be over 400 agreements of varying scope in the mining sector alone. See Ken S Coates & Blaine Favel, Understanding FPIC (Macdonald Laurier Institute, 2016) at 6; Government of Canada, “Lands and Minerals Sector – Indigenous Mining Agreements” (23 July 2020), online: <atlas.gc.ca/imaema/en/index.html> [perma.cc/7UPQ-22ZQ].
arbitration. In exchange, the Indigenous party typically agrees to refrain from legally or politically opposing the project, although the nature of the support and its consequences can vary.

While the proliferation of IBAs might be viewed as a reflection of “corporate reconciliation” (i.e., an attempt by private actors to further the aims of reconciliation), major concerns remain about the nature and voluntariness of Indigenous consent, the substantive deficiencies within some IBAs, and their likelihood of being implemented in a way that realizes the benefits promised to affected communities. These issues have spurred an interdisciplinary scholarly discussion. Given the challenges surrounding the negotiation and drafting of IBAs, these discussions are of significant value. However, less has been written


7. See McCreary, supra note 5.


about how specific legal principles derived from contract law would apply to IBAs in the case of a dispute before an arbitrator or a judge. The application of contract law principles to IBAs raises a variety of complex and critical issues, and the present article seeks to provide a novel contribution by maintaining a focus on the dispute resolution context.

IBAs are far from ordinary contractual agreements. They exist in the shadow of constitutional obligations, and despite the Crown’s legal responsibilities, the negotiation and conclusion of IBAs by private developers has come to serve as a de facto means of implementing key aspects of the duty to consult. Moreover, despite the inclusion of financial provisions, IBAs do not fit the mould of commercial contracting upon which existing contract law doctrines are founded; rather, they frequently challenge this framework by prioritizing relationship-building and by balancing economic interests with environmental, social, and cultural considerations. Is it possible to retain these nuances when such a complex relationship is filtered through the lens of contract law? The answer to this question is crucial as a rigid application of contractual doctrines, as developed in a western commercial context, risks prioritizing the worldview of the corporate developer while misunderstanding the unique nature of IBAs.

This article argues that IBAs are sui generis contractual instruments and that without careful consideration, contract law risks presenting an overly narrow lens through which to view them. To avoid such an outcome, it is desirable to envisage a contextually and culturally sensitive application of specific contract law principles relating to interpretation and good faith.

10. By “contract law,” the article intends to refer to the body of rules and principles regulating agreements between parties. In the common law provinces, this area is largely a product of common law development, rather than legislation: Angela Swan, Jakub Adamski & Annie Y Na, Canadian Contract Law, 4th ed (LexisNexis Canada, 2018) at 11. That being said, many of the arguments made in this article, properly adapted, remain relevant in the civil law: for contractual interpretation, see arts 1425-32 CCQ; for good faith, see arts 6, 7, 1375, 1434 CCQ.


12. For an example of the multifaceted purposes of IBAs, see The Raglan Agreement, Makivik Corporation, Qarqalik Landholding Corporation of Salluit, Northern Village Corporation of Salluit, Nunatulik Landholding Corporation of Kangiqsujuaq, Northern Village Corporation of Kangiqsujuaq & Société Minière Raglan du Québec Ltée, 25 Jan 1995, s 2.1 [Raglan Agreement].
Methodologically, this article builds on existing sources by considering the nature of IBAs in contrast to other forms of contracting, and by articulating a tailored approach to relevant contract law doctrines. In doing so, this article focuses on more extensive, long-term projects that involve the establishment of governance and monitoring mechanisms, rather than narrower IBAs for short-term, small-scale projects. Many publicly accessible IBAs fit the mould of the former category. Admittedly, any analysis of IBAs is hindered by the pervasive use of confidentiality clauses within IBAs. Although both Indigenous parties and corporations may have reasons for preserving confidentiality, there are concerns that preventing public scrutiny hinders transparency and exacerbates asymmetries between the parties.¹³ Nevertheless, a multitude of public IBAs, along with quantitative and qualitative academic studies, provide a window through which to analyze the nature of these agreements.

Part I places this article in context by first considering the IBA regime itself—particularly whether IBAs advance or undermine the larger struggle for Indigenous self-determination—and then identifying the scope and limitations of this article’s contributions to contract law in the IBA context.

Part II analyzes how IBAs depart from traditional contractual norms and therefore require a culturally sensitive approach. It recognizes that IBAs are *sui generis* contractual instruments concluded in the shadow of public law, while reflecting a multitude of sociocultural purposes that meaningfully differ from typical commercial contracting. Insofar as contract law aims to give effect to the parties’ agreement and reasonable expectations, the distinct expectations flowing from IBAs provide the foundation for a critical assessment of particular contract law principles.

The article focuses specifically on contractual interpretation and good faith. Having outlined the unique characteristics of IBAs, Part III then considers the ways in which interpretation and good faith can be applied to give effect to the agreement’s objectives and reconcile the parties’ varied expectations. First, it outlines a sensitive approach to contractual interpretation that challenges commercial assumptions and acknowledges the surrounding circumstances of IBAs while remaining consistent with established interpretive principles and

constraints. Second, it argues that the introduction of a duty of good faith in negotiations is warranted in the IBA context; however, it is careful to demonstrate how the constitutional backdrop of IBA negotiations serves to distinguish and insulate such a development from broader debates about the imposition of pre-contractual duties in the common law. Third, this section examines the scope of the duty of good faith at the contractual performance stage, with particular emphasis on the exercise of contractual discretion.

Ultimately, this article concludes that a careful re-examination of specific contractual principles provides a path for recognizing the unique features of IBAs while remaining consistent with Canadian courts’ development of contract law. It acknowledges that there are inherent limits to the ability of contract law to vindicate the interests of Indigenous parties, given that it remains embedded in settler legal institutions. While this article focuses on tailoring and extending certain existing contractual doctrines to the IBA context, it is open about the challenges that such efforts might involve. In parallel to other forms of engagement, it remains necessary to envisage methods of empowering Indigenous peoples within the IBA regime.14

I. THE IBA REGIME, SELF-DETERMINATION, AND CONTRACT LAW

A. THE RELATIONSHIP BETWEEN IBAS AND SELF-DETERMINATION

Before analyzing the characteristics of IBAs relative to other contracts, IBAs must be placed in the context of the struggle for Indigenous self-determination. Over the past twenty years, IBAs have become an increasingly common part of the resource development process and a leading mechanism for engagement between

developers and Indigenous communities. Understandably, they have therefore become a subject of considerable discussion.

Superficially, IBAs could be seen as a step forward, insofar as they have the potential to facilitate sustainable community development while taking steps to advance Indigenous self-determination. For example, communities might gain a degree of decision-making authority on the project as well as fiscal benefits that would serve to promote increased independence. Similarly, the exclusion of the Crown from the agreement process in favour of direct Indigenous-developer negotiations might implicitly recognize the autonomous nature of Indigenous governments while shedding layers of state paternalism. Finally, the relational structures set up by IBAs might, if properly implemented, create a project-specific source of governance powers that Indigenous communities had a meaningful role in crafting. This is a marked departure from traditional avenues of engagement which required Indigenous parties to participate in state-created and state-imposed processes. However, a closer look at the IBA regime paints a more realistic picture. There have been increasing doubts about the efficacy of IBAs and whether they may instead undermine Indigenous struggles for self-determination. A more critical theoretical lens places greater emphasis on the circumstances in which IBAs are negotiated, the structures they create, and the gap between expectations and outcomes.

First, the benefits obtained through IBAs are only achieved through an exchange requiring contractual consent to resource development. Thus, the economic benefits and environmental protections within these agreements go

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hand in hand with the further exploitation of traditional lands. Moreover, this consent—a key underpinning of the legitimacy of IBAs—is not always truly voluntary. Indeed, it merits emphasizing that resource development occurs in a legal context where Indigenous communities’ consent is not strictly required. The Supreme Court of Canada has made it clear that while a duty to consult and accommodate exists, Indigenous groups do not have anything approaching a veto over new projects on traditional territory.\(^1\) Although the federal government and some provincial and territorial governments have sought to adopt elements of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), they have stopped far short of truly implementing free, prior, and informed consent thus far.\(^2\) Consequently, although consultations could result in moderate modifications to the project, Indigenous opposition does not necessarily place its approval in doubt. For many Indigenous parties, the conclusion of an IBA may represent the best available opportunity to mitigate the social, cultural, and environmental impacts of a project that would proceed regardless of their support, while creating relational structures that allow for further participation.\(^3\) For example, the results of a case study with the Lutsel K’e Dene First Nation suggested that the group’s negotiations with mining companies were driven by the need to “accrue certain benefits from a development which they might fundamentally disagree with, and to try to mitigate impacts. They are one

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18. See *e.g.* *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59.


means for Indigenous Peoples to try to protect their land as best possible given a development going ahead.”

The approval given in IBAs, and the associated restrictions contained within such agreements, may in turn limit communities’ ability to benefit from subsequent legal developments (such as the implementation of UNDRIP’s provisions on land rights and environmental protection), which would otherwise enable greater autonomy from existing institutions. Notwithstanding that many communities conclude IBAs as a last resort despite internal disagreement on the merits of the project, IBAs can be wielded by proponents or governments in future disputes as a sign of Indigenous support or acquiescence.

Second, although IBAs can promote collaboration and relationship-building, the substance of IBAs also runs the risk of reproducing capitalist structures. For example, some governance structures created by IBAs may ultimately reflect pre-existing power dynamics by elevating development corporations and traditional leaders over marginalized members most affected by the project. Moreover, work opportunities provided by the IBA—particularly those involving travel, rotations, or abnormal working hours—may have the effect of weakening

21. Viviane Weitzner, “‘Dealing Full Force’: Lutsel K’e Dene First Nation’s Experience Negotiating with Mining Companies” (2006) at 30 online (pdf): I-Portal: Indigenous Studies Portal <https://web.archive.org/web/20220121060359/http://www.nsi-ins.ca/wp-content/uploads/2012/10/2006-Dealing-full-force-Lutsel-ke-Dene-first-nations-experience-negotiating-with-mining-companies.pdf> [perma.cc/P89J-J368]. Other Indigenous groups may be more actively supportive of development projects, and a spectrum of viewpoints may be expressed both between communities and within them; nevertheless, it is clear that, for many groups, the pressures to conclude IBAs lead them to express contractual consent to projects that many in the community oppose.

22. See UNDRIP, supra note 4, art 10-11, 25-26, 29, 32. At the same time, there are obstacles to fully realizing UNDRIP’s potential: see e.g. Pratyush Dayal, “As Saskatoon explores UNDRIP implementation, Indigenous voices want more from federal and provincial leaders,” CBC News (18 November 2021), online: <www.cbc.ca/news/as-saskatoon-explores-undrip-implementation-indigenous-voices-want-more-from-federal-and-provincial-leaders-1.6251125> [perma.cc/96C6-PFFS].


existing family and communal relationships. Such considerations suggest that the sociocultural and economic benefits obtained through IBAs are part of a broader exchange that may carry significant costs for communities.

Third, enforcement issues with IBAs mean that their benefits are not always realized. For some communities, IBAs have been a source of continued frustration and disappointment with little evidence of the collaborative relationship contemplated in the written agreement. In this sense, the monitoring mechanisms and capacity-building provisions included within the IBA are often as critical as the benefits themselves and counsel should not underestimate their importance. Even where dispute resolution provisions are relied on as a last resort following the failure of a developer to respect their contractual commitments, the enforcement of the IBA depends on the approach and remedial powers of the decision maker. Insofar as IBA clauses typically state that they are governed by the applicable laws of their jurisdiction, contractual disputes would have to be resolved using common law principles that may depart from Indigenous perspectives.

Building on the foregoing concerns, it is reasonable to approach IBAs from a more critical perspective, particularly given the risk that some IBAs could hinder Indigenous self-determination. IBAs must be understood in light of the practical

25. See *e.g.* Arielle Dylan, Bartholemew Smallboy & Ernie Lightman, “‘Saying No to Resource Development is Not an Option’: Economic Development in Moose Cree First Nation” (2013) 47 J Can Studies 59 at 69-70, DOI: <https://doi.org/10.3138/jcs.47.1.59>.
28. See Dayna N Scott, “Extraction Contracting: The Struggle for Control of Indigenous Lands” (2020) 119 South Atlantic Q 269 at 270-71, DOI: <https://doi.org/10.1215/00382876-8177759>. The role of contract law in the face of inadequate remedies will be touched on in s II(B).
30. See *e.g.* Scott, *supra* note 28 at 280-81, 292; Gunton, Werker & Markey, *supra* note 16. A smaller subset has prioritized Indigenous resurgence, encouraging Indigenous communities not to participate in engagement processes that reproduce capitalist models. See Boron & Markey, *supra* note 24 at 152. The relationship between IBAs and the broader reconciliation project can be subjected to similarly diverging lenses: On the one hand, IBAs might appear to provide autonomy and resources that better prepare Indigenous communities in their interactions with the Crown and non-Indigenous institutions; thus, they could be said to facilitate Indigenous engagement in the larger process of reconciliation. On the other hand, the privatization of public law disputes and the dependencies created by IBAs can further entrench the status quo while precluding avenues of resistance that could otherwise lead to
realities of IBA negotiation and implementation, rather than the illusion of an equal playing field. At the same time, a focus on practical realities also means recognizing that participation and sociocultural protection through IBAs may be better than none at all. Further, Ciaran O’Faircheallaigh notes that many of the strongest critiques of the IBA regime are not based on a solid empirical foundation: They suppose uniformly negative outcomes while the actual history of IBAs is one of mixed results with significant divergence.\textsuperscript{31} IBAs can sometimes achieve positive outcomes, but a variety of factors influence whether they further or hinder the aspirations of Indigenous communities and the pursuit of self-determination. The uncertainty within the IBA regime arguably mirrors the mixture of support and skepticism felt among participating Indigenous communities. Put simply, IBAs exist at the intersection of empowerment and oppression. Their ultimate impact on the larger struggle for self-determination depends on a constellation of factors in their negotiation and performance.

Given the unpredictability of IBA outcomes, a more equitable approach is clearly needed. The IBA regime does not obviate the need for further action and must operate in parallel to other forms of Indigenous engagement. This may include opportunities for economic partnerships and Indigenous-led projects such as the Cedar LNG Project.\textsuperscript{32} More broadly, it may mean a framework in which Indigenous communities can play a more active and constructive role in meaningful progress in reconciling Indigenous and settler systems.


\textsuperscript{32} See Katie DeRosa, “$2.4-billion Cedar LNG project on Haisla-owned land near Kitimat gets B.C. approval,” Vancouver Sun (14 March 2023), online: <vancouversun.com/news/local-news/cedar-lng-project-on-haisla-owned-land-near-kitimat-gets-bc-approval> [perma.cc/MXY3-KHW8]. Such initiatives could allow Indigenous groups to play an active role in every stage of the process, rather than seeking to secure participation and benefits from a project managed by a settler corporation. At the same time, they do not assuage concerns as opportunities to further self-determination remain tied to resource development, which can involve other trade-offs: see Matt Simmons, “B.C.’s latest LNG approval sends mixed messages about commitments to climate and Indigenous Rights,” The Narwhal (26 March 2013), online: <www.thenarwhal.ca/bc-cedar-lng-approval> [perma.cc/5J54-WZP7]. For agreements between Indigenous governments and their federal or provincial counterparts, see the recent agreement between British Columbia and Blueberry River First Nations, as well as those reached with other Treaty 8 groups: Derrick Penner, “Blueberry River First Nation eyes restoration, limited development in land agreement with B.C.,” Vancouver Sun (18 January 2023), online: <vancouversun.com/news/local-news/blueberry-river-first-nation-restoration-development-agreement-bc> [perma.cc/6BUG-2RYH].
in deciding whether, and how, a project should proceed so that opportunities for self-determination are not conditional on support for extractive industry development. Ultimately, it is important to acknowledge the practical reality that hundreds of IBAs have been signed in Canada and that, despite their flaws, they continue to be a common instrument used by Indigenous communities. Communities should not be asked to wait for a better regime to come to fruition; IBAs must therefore be understood as one prong—albeit a flawed one—in a broader strategy to gain “multiple access points to political power.” Viewed through this lens, the most critical question becomes how to address the significant variability in IBA outcomes and to better align them with Indigenous aspirations to the extent possible. The foregoing concerns relating to IBAs reinforce why it is critical that the interpretation and application of such agreements be approached with care.

B. THE RELATIONSHIP BETWEEN IBAS AND CONTRACT LAW

This article is focused on the interaction between IBAs and contract law principles. However, it should be noted that contract law is one of a variety of factors influencing IBA contracting. At the outset, experienced counsel and careful drafting remain of the utmost importance to maximize sociocultural benefits, mitigate the harms of resource development, and preserve flexibility for Indigenous communities to exercise rights originating outside of the agreement. Even effective community monitoring and a sensitive approach to resolving disputes are unlikely to fully remedy the consequences of deficient advice and flawed drafting. This article does not analyze such topics at length, primarily because they have already been the subject of valuable and extensive discussion. For example, a thorough consideration of IBA drafting can be found in Ginger

33. To that end, recent proposals to give Indigenous communities a percentage of resource revenues may constitute a step back, given that they risk presenting financial benefits as a substitute for environmental, social and cultural safeguards, and as a way to undermine efforts to increase Indigenous decision-making authority. See Brett Forester, “Poilievre’s First Nations consultation pledge garners mixed reviews, call for ‘more substance’,” CBC News (26 January 2023), online: <www.cbc.ca/news/indigenous/poilievre-consultation-resource-pledge-1.6727348> [perma.cc/8F3U-7XP6].


35. Some participants disappointed by the outcomes provided by IBAs have also raised concerns about external consultants and counsel. See Craik, Gardner & McCarthy, supra note 17 at 384.
Gibson and Ciaran O’Faircheallaigh’s IBA community toolkit. Similar guides have been prepared by Canadian law firms advising Indigenous clients, and scholarly works have provided additional insight into IBA drafting through particular case studies. Alongside written works, innovative initiatives such as the Centre of Expertise on Impact and Benefit Agreements and, in British Columbia, the Centre of Excellence in First Nations Economic Development can also provide insights and resources to help communities benefit as much as possible from IBAs. This article reinforces the importance of drafting at multiple instances, but focuses on examining IBAs from a different angle.

Even with careful drafting, broad clauses and contextual duties are frequently included in IBAs. This is not surprising given that such agreements are designed to create relational structures for a longer-term project. Moreover, it can be difficult to precisely articulate duties related to unforeseeable environmental or sociocultural harms, particularly when IBAs are formed before environmental assessment processes are completed. This suggests the possibility of an outsized role for contractual doctrines including interpretation and good faith. Accordingly, a more thorough understanding of how interpretation and good faith operate in the IBA context can play a role in how the agreement is performed and enforced, both directly and indirectly.

At the performance stage, parties’ assessment of the express and implied duties within the agreement could conceivably influence how they perform those duties to ensure compliance. Similarly, legal advice on the most likely

38. See e.g. O’Faircheallaigh, “Monitoring Instruments,” supra note 7; Mary M Cascadden, Best Practices for Impact Benefit Agreements: A Case Study of the Mary River Project (MRM Dissertation, Simon Fraser University, 2018) [unpublished].
40. See e.g. Odumosu-Ayanu, supra note 20 at 223; Sosa & Keenan, supra note 6 at 18.
outcome of a dispute could affect parties’ willingness to take riskier actions. For example, a resource developer might alter their approach to satisfying broadly worded obligations and might engage more extensively within the participatory mechanisms set up by the agreement, if it were clear that a decision maker would adopt a rigorous approach to interpretation and good faith. In this sense, the thorough examination of key contract law principles can play a preventative role, although it must be acknowledged that a variety of other factors would influence the parties’ conduct and cost-benefit analysis.

Moreover, given that recourse to an adversarial arbitration process can affect the overall relationship between the developer and the Indigenous community, additional clarity on the proper approach to resolving IBA disputes can better position the parties to weigh alternative options and arrive at a satisfactory solution. Admittedly, recourse to formal dispute resolution may pose a risk to the relationship between the parties and diminish the prospects of further collaboration. Even so, Indigenous communities’ experience with modern treaties shows that sometimes, litigation or arbitration is the only option left to resolve issues with significant implications.41 When contractual terms are not clear, benefits are not being provided by the developer, or the developer is intent on taking harmful actions, the parties’ relationship may already have turned adversarial. In such circumstances, litigation or arbitration may constitute the only way of resetting the relationship through the issuance of a clear decision on the scope of each party’s obligations.

At the dispute stage, the existence of a well-developed framework for understanding IBA agreements can provide critical guidance for decision makers and ensure that Indigenous perspectives are properly considered. It can also provide a foundation for persuasive pleadings by counsel and situate the parties’ arguments within a sound doctrinal framework. Since IBAs are partly instruments that mitigate the sociocultural side effects of resource development for Indigenous communities,42 an exploration of contractual principles can at least serve to avoid decisions that undermine the operation of the agreement and silence Indigenous viewpoints. Few decisions have been made public through

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41. See e.g. Corporation Makivik c Québec (Procureur général), 2014 QCCA 1455 [Corporation Makivik]; Québec (Attorney General) v Moses, 2010 SCC 17 [Moses].
which one could assess adjudicators’ treatment of IBAs.\textsuperscript{43} Nevertheless, the presence of detailed dispute resolution chapters in IBAs means that such an important monitoring mechanism in IBAs should be studied, in order to propose approaches to decision-making that preserve its viability as a meaningful avenue for dispute resolution.

Before embarking upon this study, two further notes warrant attention. First, it should be acknowledged that there are inherent limits to what can be achieved at the dispute resolution stage. For example, the efficacy of contract law adjudication is strongly related to the remedies that it offers to parties. Some Canadian arbitration acts empower arbitrators to order specific performance;\textsuperscript{44} however, it is true that in the common law, damages are the general remedy for contractual breaches (even though specific performance can be awarded in exceptional circumstances where damages would be inadequate).\textsuperscript{45} The default award of damages is particularly unsuitable for \textit{sui generis} IBA contracts, where monetary compensation is difficult to reconcile with the long-term environmental and sociocultural harms exacerbated by contractual breaches. This article focuses more on contractual principles related to the delineation of parties’ duties rather than the issue of remedies. Nevertheless, the arguments highlighting the nature of IBAs can readily apply in support of a more sensitive approach to choosing contractual remedies and to evaluating whether the requirements for awarding specific performance have been satisfied. Moreover, there remain other avenues to secure effective remedies in certain circumstances. For example, the express inclusion of clauses allowing for recourse to courts for injunctive and preliminary relief can strengthen the Indigenous party’s position, particularly in combination with a stronger prima facie case due to a culturally sensitive approach to understanding the contract. Similarly, an Indigenous party could seek a declaratory remedy to proactively clarify the terms of the agreement with greater confidence that the decision maker would meaningfully consider the true nature of the agreement. As for damages as a common remedy, even if they are far from satisfactory, the creation of dispute resolution mechanisms remains a relevant part of IBAs, and communities who decide that this option is worth

\textsuperscript{43} The number of IBA disputes that have occurred, and how they have been brought to adjudicators, is difficult to estimate given the confidentiality of many agreements and dispute processes.

\textsuperscript{44} See \textit{e.g.} \textit{Arbitration Act}, SO 1991, c 17, s 31.

exercising deserve to have their perspectives properly considered by the decision maker. Thus, while a sensitive approach to contract law is not a panacea, it can complement advances in drafting, negotiation, and the use of other sources of power outside of state-influenced systems.

Second, the lack of extensive jurisprudence reinforces the importance of scholarship in filling the gap left by adjudicators and regulators. Without a sound jurisprudential backdrop or public resources at their disposal to properly contextualize contract law principles for IBAs, adjudicators may be inclined to apply jurisprudence derived from traditional commercial disputes without considering the adaptations required for the IBA context. The few public cases that indirectly involve the characterization of IBAs demonstrate this danger. In two cases concerning injunctions, Métis Nation – Saskatchewan v Nexgen Energy (“Nexgen”) and Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy) (“Nunatukavut Council”), IBAs are briefly discussed, but are reduced to unremarkable private economic agreements. In Nexgen, the court suggested that the “purpose of the IBA is to settle the economic benefits that would flow to [Métis Nation – Saskatchewan] if the Project proceeds”; similarly, in Nunatukavut Council, land claims agreements and IBAs—including agreements with state entities—were characterized as “largely economic agreements.” This at least suggests that, without additional guidance, courts may be inclined to apply a standard commercial lens to IBAs. As will be explained, characterizations of this nature minimize the ways in which IBAs interact with constitutional duties and embody broader sociocultural purposes.

Rather than reading too much into stray passages in certain decisions, this article seeks to provide alternative guidance on how IBAs should be understood, and how such an understanding would affect contractual interpretation and good faith. When disputes that directly concern IBAs come before an arbitrator or a

46. Although federal and provincial legislatures have developed environmental assessment processes that may be influenced by the conclusion of agreements with the affected community, they have generally not sought to regulate the form of the negotiations or the substance of the resulting IBAs. In this regard, Inuit IBAs stand as an exception, although the NLCA still confirms that the common law of contract applies: see Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (1993), art 26.9.1, online: <gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf> [perma.cc/493T-68GY] [NLCA].
47. 2021 SKQB 195 [Nexgen].
48. 2011 NLTD 44 [NCC].
49. Nexgen, supra note 47 at para 92.
50. NCC, supra note 48 at para 30.
superior court judge, it is critical that they are equipped with thorough guidance on how to approach such a distinctive contractual agreement. Consequently, scholarship can play an important role by outlining a cohesive approach to interpreting and enforcing IBAs, and by promoting a critical discussion at the intersection of private and public law.

II. THE *SUI GENERIS* NATURE OF IBAS IN RELATION TO TRADITIONAL CONTRACTING

The preceding section situates IBAs in relation to the broader struggle for self-determination and the evolution of contract law. Building on the foregoing, it is possible to more directly assess how IBAs should be understood by adjudicators. Accordingly, the following section examines the unique character of IBAs and the ways in which this uniqueness should influence adjudicators’ approach to contract law. First, it explores how IBAs are informed by their constitutional context and operate as a de facto transfer of state responsibilities to private developers. Second, it examines the purposes of IBAs in order to challenge attempts to portray such agreements as mere transfers of economic benefits. By properly characterizing the diverse objectives of IBAs and the exchange that occurs within them, it becomes possible to reassess principles designed to operate within a commercial context. Taken together, Part II distinguishes IBAs from traditional private agreements and hints at a more flexible approach to contractual analysis. Its insights serve as a foundation for the more specific contributions to interpretation and good faith, developed in Part III.

A. PRIVATE AGREEMENTS IN THE SHADOW OF PUBLIC LAW

IBAs may be private agreements, but they are intertwined with the fulfillment of public duties. A careful approach to contract law should acknowledge this unique situation. More particularly, the interpretation of IBAs and the assessment of developers’ behaviour should be informed by the lessons and approaches of public law jurisprudence, to promote harmony between connected areas.

In *Haida Nation v British Columbia* (“Haida”), the Supreme Court recognized the existence of a duty to consult and accommodate Indigenous peoples. The duty is engaged when the Crown has real or constructive knowledge of a potential Aboriginal right or title and is contemplating conduct that might adversely affect it.\(^51\) At that point, the Crown has a duty to consult and accommodate

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51. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 [*Haida*].
the affected group. The intensity of this duty varies based on the strength of the claim and the seriousness of the potential infringement. While the duty to consult originates from contemplated Crown conduct, the Court considered whether private parties also bore legal responsibility. Chief Justice McLachlin answered the question in the negative, concluding that “the duty to consult and accommodate...flows from the Crown’s assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate.” Chief Justice McLachlin nevertheless left the door open for private sector involvement by acknowledging that the Crown may “delegate procedural aspects of consultation to industry proponents seeking a particular development...However, the ultimate legal responsibility for consultation and accommodation rests with the Crown.” Thus, where Crown conduct has given rise to the duty to consult, the engagement undertaken by private developers may thereafter play a role in procedural aspects of the consultation process.

Despite this theoretically limited role for private actors, subsequent practice paints a different picture. In the years since the Supreme Court’s decision, the involvement of private sector actors has grown significantly and—faced with the risk of project delays due to the Crown’s failure to adequately consult Indigenous communities—resource developers have increasingly engaged directly with Indigenous leadership to minimize opposition through the conclusion of IBAs. The Crown has at times actively encouraged such an approach, which allows it to play an important background role while benefiting from the privatization of resource conflict. The ensuing interplay between IBAs and constitutional duties has had the practical effect of pushing such agreements beyond the traditional confines of private law.

In particular, the rise of IBAs has altered the Crown’s approach to consultation and has, in some cases, displaced important aspects of its execution onto corporate actors. The extent of federal and provincial delegation exists on a spectrum from ministry-led consultation processes to engagement funded and conducted by the project proponent. Although governmental approaches

52. Ibid at para 39.
53. Ibid at para 53.
54. Ibid.
55. See e.g. McCreary, supra note 5 at 188; Coates & Favel, supra note 5 at 17-18.
continue to evolve, many of Canada’s existing IBAs were likely negotiated under the shadow of previous assessment processes. Thus, while the role for private actors can be significant, it remains procedural in character and does not shift the ultimate constitutional burden as explained below. In parallel, the proliferation of IBAs has further distanced the state from affected communities. Given that private negotiations frequently precede or operate in parallel to public environmental assessment processes, if these negotiations culminate in the drafting of an IBA, direct Crown consultation may be relatively superficial. Indeed, some government decision makers appear to accept IBAs as evidence that the affected communities have been consulted and accommodated. For example, one Indigenous consultant in the IBA sector posited that IBAs partly serve to let governments

off the hook for taking care of their consultation and accommodation responsibilities. The company’s going to do it and get the First Nation to sign; then really the Crown can sort of wash its hands and say “consultation and accommodation accomplished. Problem solved. We don’t have to get involved. Someone else has solved it for us.”

This perception is consistent with state conduct. In subsequent litigation, the presence of IBAs has been used as evidence of Indigenous consent to defend against claims of insufficient consultation. This shift in the Crown’s role has not gone unnoticed among industry proponents. While resource developers continue to have personal incentives to conclude agreements, their behaviour can also be understood as a response to the retreat of the public sector, as governments engage in “off-loading public sector


59. See Cameron & Levitan, supra note 9 at 37-40; Wright, supra note 58 at 26; Ariss, Fraser & Somani, supra note 57 at 41-42; Roth, supra note 11 at paras 25-26.

60. Cameron & Levitan, supra note 9 at 38.

61. See Scott, supra note 28 at 278-79.
responsibilities onto the private sector” through IBAs. Some scholars have therefore suggested that the use of IBAs has facilitated a gradual “privatization” of the duty to consult.

The ultimate legal burden has not shifted: It remains the Crown’s responsibility and only the Crown can fulfill it in substance. However, insofar as the duty to consult does not dictate a particular result, “procedural delegation to industry means that ‘in practice, much of the obligation to consult falls to industrial proponents.’” Consequently, in many cases, private corporations have de facto replaced the state in fulfilling portions of its required engagements with Indigenous peoples without a corresponding shift in constitutional responsibilities. The burden falls upon private law to scrutinize developers’ conduct when negotiating and executing IBAs. From this lens, the approach to interpreting and enforcing IBAs takes on an outsized importance.

This is particularly so because, while Crown conduct heavily influences the IBA regime, IBAs may reduce the potential scrutiny of the Crown’s actions. IBA negotiations occur against the backdrop of state processes, from provincial policy documents on Industry-Indigenous agreements to formal environmental assessment projects. The latter’s impact can often depend on timing. While negotiations at an early stage can provide additional leverage for Indigenous groups, they may increase uncertainty about the scope and impacts of the

63. See Cameron & Levitan, supra note 9 at 37.
65. This blending of public and private responsibilities is far from a novel feature in Indigenous-settler interactions. Rather, it is arguably the latest step in a process of dispossession wherein private actors played an integral role. Indeed, early on in Canada’s colonial history, companies such as the Hudson’s Bay Company were empowered to conduct trade and regulate the surrounding territory; see McCreary, supra note 5 at 174-75.
66. At the same time, there is the possibility that decisions affecting economic benefits derived from IBAs linked to Aboriginal and Treaty rights can trigger the duty to consult: Ermineskin Cree Nation v Canada (Environment and Climate Change), 2021 FC 758, appeal dismissed in 2022 FCA 123 but only due to Coalspur’s discontinuance of the appeal in light of the mootness of a related appeal. However, even in such a case, the IBA regime has altered the way in which Crown decisions are scrutinized; it may even be decisions to restrict resource development that lead to a breach.
project. Conversely, state decisions to approve projects before outstanding issues are addressed can have the opposite effect. For example, in *Eabametoong First Nation v Minister of Northern Development and Mines*, the Eabametoong First Nation successfully sought a judicial review of a permit for exploratory mine drilling on its traditional territory. The Ontario Superior Court of Justice noted that the Ministry of Northern Development and Mines’ policy involved delegating aspects of consultation to the proponent and strongly encouraging the conclusion of agreements, thereby setting the stage for the power dynamic between the parties. Later, the Ministry changed course and took a unilateral approach to approving the permit. Among other effects, this approach undermined Eabamatoong’s bargaining power by removing any incentives which Landore may have had to negotiate. Moreover, it is worth noting that the Indigenous party’s negotiating power is, in any case, hindered by the Crown’s historical assertion of sovereignty over traditional lands. Thus, the Crown’s influence remains indirectly felt in IBA contracting.

At the same time, IBAs serve to redirect traditionally public law disputes, thereby implicating the Crown into private dispute resolution structures. Indeed, IBAs often preclude Indigenous parties from opposing the project or from pursuing legal action that would hinder the project’s development. Some even require Indigenous groups to dissuade their members from taking any actions that would impede the project. This is not surprising. As Part I notes, the benefits derived from many IBAs come with constraints which may restrict access to other avenues for pursuing self-determination. For example, in the *Pinehouse Agreement*, the Northern Village of Pinehouse agreed to refrain from taking a formal stance against the project or opposing the issuance of any authorizations.

67. On timing, see *e.g.* Wright, *supra* note 58 at 36; Gilmour & Mellett, *supra* note 6 at 398-99. See also Fidler & Hitch, *supra* note 58 at 59.
68. 2018 ONSC 4316.
70. *Ibid* at para 71.
71. To use the terminology of *Mitchell v MNR*, 2001 SCC 33 at paras 9-10.
73. See *e.g.* Chantelle Bellrichard, “Benefits agreement asks First Nation to discourage members from hindering B.C. pipeline project” (9 August 2019), online: CBC News <www.cbc.ca/news/indigenous/coastal-gaslink-nak-azdli-whut-en-agreement-1.5238220> [perma.cc/KVE8-7HMR].
and, although they maintain the ability to seek a general declaration establishing Aboriginal rights, they cannot launch an action that would unduly impact the operation of the project.74 Similarly, in the Whale Tail Inuit Impact Benefit Agreement ("Whale Tail IIBA"), section 3.1.6 confirms that the Kivalliq Inuit Association ("KIA") cannot “initiate any judicial or administrative procedure, nor initiate any other activity whatsoever, intended to delay or block the Whale Tail Project, except in accordance with this Agreement or the Production Lease or any other lease or license issued by KIA for the Whale Tail Project.”75 Common provisions of this nature can have important consequences. During the Ekati mine development in the Northwest Territories, the IBA prevented one group from opposing a decision to grant a water license, such that they were unable to seek compensation for its effects on their water use.76 Some agreements even include explicit language wherein the parties agree that the Crown’s duty to consult and accommodate has been fulfilled.77 Regardless of the value of such provisions, they constitute attempts to prevent litigation that would delay the project and therefore reduce the likelihood of constitutional claims. In this sense, IBAs entail a “fundamental shift in the ability of Aboriginal groups to exercise legal rights they would otherwise have available.”78

These may be concessions viewed by Indigenous parties and their counsel as necessary to secure the benefits flowing from an agreement, and there may be narrower approaches to drafting such provisions. Nevertheless, they operate to privatize disputes of public importance. Even without such provisions, many core issues are likely to have been discussed and addressed through the conclusion of an IBA which may limit the matters raised directly before government decision makers.79

In this way, discussions concerning potential infringements upon the community’s traditional territory and way of life are likely to be resolved by contractual clauses or by the governance structures developed within the IBA and, in the case of disagreement, transferred to private dispute resolution.

74. See Pinehouse Agreement, supra note 7, art 5.
75. Whale Tail Project Inuit Impact & Benefit Agreement, Kivalliq Inuit Association and Agnico Eagle Mines Limited, 15 June 2017, s 3.1.6 [Whale Tail IIBA].
76. See Sosa & Keenan, supra note 6 at 10.
77. See Gilmour & Mellett, supra note 6 at 390-91; Northwest Territories, supra note 6 at 12.
78. O’Faircheallaigh, “Understanding Corporate-Aboriginal Agreements,” supra note 72 at 72.
79. Confidentiality clauses may also influence the nature of public discussions. See generally Hummel, supra note 9.
80. Although IBAs do not define the scope of Aboriginal rights, they can have long-term effects on community members’ ability to exercise them. See Otis, supra note 7 at 457-58.
mechanisms such as mediation and arbitration. There are benefits to such an approach, given the costs of lengthy litigation. However, by transforming potentially public law questions into private law disputes, the contractual enforcement of IBAs takes on additional dimensions. Insofar as IBAs indirectly fulfill the duty to consult and accommodate while deterring constitutional litigation, the protection of Indigenous groups’ constitutional interests arguably hinges on the proper enforcement of contractual agreements. This relieves the Crown from accountability in some circumstances despite its ability to shape the playing field. Consequently, the breach of an IBA is far more serious than in the context of traditional commercial contracts, and the constitutional backdrop for these agreements should reinforce the need for adjudicators to carefully scrutinize the corporate developer’s behaviour throughout the life of the contract.

Finally, beyond being intertwined with constitutional duties and disputes, larger IBAs can serve as supra-regulatory governance instruments. The content of IBAs suggests that activities traditionally undertaken by the state are being fulfilled via private agreement. In relation to public services, project developers may be required to provide financial funding and infrastructural support for community programs. Developers are also involved in the establishment of training programs that help to qualify community members for employment opportunities, as well as wellness programs and educational scholarships. Even direct financial transfers have a governmental dimension to them because they are used by communities to fill gaps in public funding. Thus, private corporations’ IBA commitments serve to preserve and enhance community services in the wake of state neglect.

On the regulatory plane, several provisions within IBAs are designed to fill gaps left by the legislative and executive branches. For example, anti-discrimination policies for employment and workplace conduct are a common feature of IBAs, which can provide tailored protections and accommodations that may be absent

81. For example, theories of efficient breach that take a narrow view of the morality of contracting are highly inappropriate. For more on this theory and its general criticisms, see Nina CZ Khouri, “Efficient Breach Theory in the Law of Contract: An Analysis” (2002) 9 Auckland UL Rev 739.

82. See Sosa & Keenan, supra note 6 at 16-17.


from existing human rights and labour schemes.\textsuperscript{85} The same logic applies to provisions that mitigate environmental impacts and promote safe development: In the face of deficiencies in environmental regulations and assessment processes, Indigenous groups must negotiate a private regulatory framework that offers protections that the state was unable to provide.\textsuperscript{86} This phenomenon has led some scholars to characterize IBAs as “supra-regulatory” governance instruments, since they enact regulatory standards and create parallel governance structures on a project-specific basis.\textsuperscript{87} The result is that the continued funding of community services and the enforcement of regulatory standards—traditionally matters of public law—must be protected within the contractual realm.

Taken together, IBAs blur the line between public and private instrument, between corporation and state, and between constitutional and contractual obligation. The corollary of the privatization of state-like activities is that IBAs have become \textit{sui generis} contracts intertwined with traditionally public law considerations, and they should be treated as such. This entails a flexible approach to contractual analysis that harmonizes the application of existing principles with constitutional developments. Indeed, it would be inconsistent for the judicial system to promote the aims of reconciliation and consultation in public law while failing to properly enforce contractual obligations that have become a vehicle through which these issues are addressed in private law. This is particularly so given that the formation of IBAs is, in a sense, a private manifestation of courts’ oft-repeated encouragement that parties prioritize negotiation.\textsuperscript{88}

Although the ways in which specific contractual doctrines can be harmonized with constitutional jurisprudence are developed in Part III, it is worth recognizing that the notion of promoting consistency between private law rules and constitutional values is not new to common law jurisdictions. For example, the South African Constitutional Court has taken particular care to develop contract law in line with constitutional rights.\textsuperscript{89} Indeed, it has developed the concept of
public policy with reference to constitutional principles, and has highlighted the need to “infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact.”

Admittedly, the Canadian judicial system does not boast such a specialized tribunal or a constitution that specifically empowers the development of the common law in light of constitutional rights; however, Canadian courts have recognized the need to ensure that common law rules are developed in a way that is consistent with Charter values. Thus, in *Hill v Church of Scientology*, Justice Cory noted that “[t]he Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.”

A somewhat analogous argument could be made in the context of section 35 of the *Constitution Act, 1982*: The promotion of reconciliation between Indigenous and non-Indigenous communities (including the protection of Aboriginal rights and the duty to consult) represent core values that should influence the development of legal principles, particularly in relation to contractual instruments that are intrinsically tied to the privatization of traditionally public law issues. Where a private actor has, in practice, taken responsibility for consultation and where the resulting accommodations are contained within a contractual agreement, decision makers should ensure that contract law doctrines applied to the dispute are consistent with constitutional values and are guided by the lessons of Aboriginal law jurisprudence.

It is worth acknowledging that Canadian courts have remained cautious and have preferred to incrementally develop the common law. Thus, there are important limits to the types of changes that would be accepted, particularly for the arbitrators or first-instance judges who are most likely to adjudicate IBA disputes. Nevertheless, even small, incremental adjustments that harness

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90. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*, [2012] ZACC 30 (SAFLII) at para 71 [*Everfresh*].


93. See e.g. *Southwind v Canada*, 2021 SCC 28 at para 55.

the flexibility provided in established contract law doctrines could help protect Indigenous parties. Consequently, as Part III argues, adjudicators could adopt a sensitive approach to interpretation that acknowledges the aspirations of the agreement while remaining consistent with contractual principles. Similarly, although corporations may not be subject to constitutional duties, the analysis of their contractual conduct might be subtly influenced by public law approaches in order to recognize the ways in which IBAs blur the line between public and private law.

B. SOCIOCULTURAL AGREEMENTS THROUGH THE LENS OF COMMERCIAL PRINCIPLES

Alongside their relationship to public processes, the purposes of IBAs also serve to distinguish them from traditional commercial agreements. Such an understanding recognizes that the purposes of many modern IBAs extend well beyond mere economic transfers, which, in turn, may require adjudicators to temper contractual principles developed within and tailored to purely commercial disputes. IBAs represent an exchange, where the promises given by both sides cannot be dissociated from their environmental, social, and cultural foundations.

The primary benefits offered by Indigenous parties are their consent to the project and access to their traditional lands, as well as restrictions on their ability to stop development from proceeding by other means. This is a significant sacrifice in order to obtain the benefits of an agreement; IBAs cannot be divorced from the harms that may arise from the project. Nevertheless, while it may ultimately facilitate the resource development process and therefore benefit the corporation financially, the promises made by the Indigenous community within the agreement cannot be viewed from a purely commercial lens. The IBA is not the instrument through which the project is greenlit; as previously noted, many projects would likely proceed without such an agreement. The concession provided by the Indigenous community is therefore not financial in nature, even if it may have indirect financial effects; rather, as a commitment of support for the project, it provides project proponents with a form of “social license”

95. See also Motard, supra note 6, who complements this article’s analysis by focusing on the collective, political, and intergenerational nature of the benefits provided within IBAs.
96. See Scott, supra note 28 at 275.
(however flawed this may be in practice) so as to foster positive relationships with affected groups.97

As for the promises made by the developer, these reflect a multitude of aims, many of which are non-economic in nature. Although agreements vary widely, portions of modern IBAs are frequently dedicated to establishing processes that, at least on paper, provide Indigenous parties with an opportunity to raise concerns and participate in addressing unforeseen impacts.98 These provisions seek to structure the relationship between the parties and create space for communities' cultural, social, and environmental viewpoints to be raised. For example, some participatory structures explicitly provide a venue for sharing Indigenous traditional knowledge and help to move the parties away from prior relationships characterized by a neglect and devaluation of Indigenous contributions to resource management. Thus, in the Diavik Diamonds Project Environmental Agreement, an advisory board is empowered to create ad hoc panels for the application of Indigenous knowledge alongside other types of scientific knowledge.99 Similarly, in the Mary River Inuit Impact and Benefit Agreement (“Mary River IIBA”), the parties can create working groups that help to incorporate Inuit Qaujimajatuqangit into project planning.100

More specific provisions in IBAs further these aims by addressing particular cultural and environmental issues. For example, certain agreements enshrine a partial right of access for community members seeking to travel or pursue traditional activities.101 Similarly, some IBAs from Australia contain procedural obligations in the event of the discovery of artifacts on the Indigenous party’s traditional territory, thereby preventing cultural losses that might occur without

97. Fidler & Hitch, supra note 58 at 59; Wright, supra note 58 at 22. See also Woodward & Company, supra note 37 at I-5. Note, however, that there have been ongoing debates about the concept of "social license." See e.g. Kristen van de Biezenbos, “The Rebirth of Social License” (2019) 14 MJSDL 154.

98. See e.g. Northwest Territories, supra note 6 at 8-9. But see O’Faircheallaigh, “Understanding Corporate-Aboriginal Agreements,” supra note 72 at 77, on the gap between the obligations contained within IBAs and their actual enforcement.


100. See Mary River IIBA, supra note 83, arts 15.5.2(e), 16.3.

101. See Raglan Agreement, supra note 12, s 11.2.
such an agreement. In this way, IBAs serve as a recognition of the cultural disruption that resource projects pose to affected groups and offer a pathway to mitigating their effects.

Even provisions that might, at first glance, focus primarily on economic benefits can also be tied to sociocultural concerns and broader efforts to promote Indigenous autonomy; these dimensions should not be minimized in favour of a purely financial understanding of the agreement’s benefits. Notably, provisions concerning the employment of community members and the prioritization of Indigenous businesses are sometimes supported by anti-discrimination policies to promote a culturally safe workplace and the establishment of an employment committee to promote active collaboration. Provisions of this nature might be understood as an implicit recognition that shifting employment patterns towards settler organizations carry cultural risks and the potential to reshape community bonds.

Similarly, direct financial benefits have a sociocultural dimension, insofar as they have the potential to fund public services for community members’ social well-being. As the arbitrators in a dispute relating to the Mary River IIBA recognized, “one of the purposes intended for Inuit financial participation in the Project was to benefit Inuit by providing the resources necessary to address such consequences as disruption of wildlife, aggravation of social problems and amelioration of environmental and socioeconomic impacts of the Project.” Admittedly, some groups may be more focused on financial benefits and relational structures might be less sophisticated for smaller projects. Thus, the transfer of money and revenue sharing remains an important component of IBAs’ successful implementation. However, these provisions should not be dissociated from the communal purposes of the transfers or singled out to the exclusion of the multitude of other provisions within IBAs.

Taken further, when the content of many IBAs is analyzed in full, developers’ commitments to public funding and capacity building, educational training,
heightened environmental standards represent a balancing of economic interests related to the project with its sociocultural impact on Indigenous communities. From this lens, the equilibrium reached by both parties does not solely reflect economic considerations; IBAs make room for other interests to be protected and, in some contexts, prioritized. It would therefore be inconsistent with the equilibrium reached by the parties to treat an IBA as a purely financial instrument.

This perspective is reinforced by existing agreements that contain clauses outlining their purposes. For example, the *Raglan Agreement* references the multitude of objectives that inform the content of the contract:

2.1.1 To facilitate the development and operation of the Raglan Project in an efficient and *environmentally sound* manner;

2.1.2 To facilitate *equitable and meaningful participation* for Inuit Beneficiaries and, in particular, the Inuit Beneficiaries of Salluit and Kangiqsujuaq, with respect to the Raglan Project;

2.1.3 To ensure that Inuit Beneficiaries and, in particular, Inuit Beneficiaries of Salluit and Kangiqsujuaq, *derive direct and indirect social and/or economic benefits* during both the Development and Operations Phases of the Raglan Project;

2.1.4 To incorporate the results of the Parties’ direct discussions regarding the *Environmental Impact Study*;

2.1.5 To ensure that *monitoring of impacts* takes place and that *unforeseen impacts*, or impacts the scope or significance of which are greater than foreseen, are dealt with;

2.1.6 To secure the *support of the Inuit Parties* for the development and operation of the Raglan Project;

2.1.7 To provide an efficient ongoing *working relationship* between the Parties prior to the Development Phase and during the Development and Operations Phases of the Raglan Project.107

The *Raglan Agreement*’s objectives highlight that economic considerations are indeed relevant to the IBA, but that they are intertwined with other core concerns, including the creation of spaces for Indigenous participation and input, the promotion of environmental sustainability, the mitigation of unforeseen impacts, and the obtention of a social license from the Inuit communities.108 All these objectives are borne out by the content of the contract. Such a multifaceted framework is representative of the delicate balancing act in many other IBAs.

107. *Raglan Agreement*, *supra* note 12, s 2.1 [emphasis added].
108. *Ibid*, ss 4, 8-10, 12.
The precarious foundation upon which IBAs are negotiated, and the difficult decisions that Indigenous communities must make reinforce that the sociocultural benefits drafted into the agreement are the product of hard-fought negotiation. What is gained at the drafting stage should not be lost at the dispute resolution stage. Unfortunately, such nuances risk being lost when the parties’ relationship is filtered through the lens of contract law. In a commercial context, both parties could be viewed as self-interested market actors and the treatment of the agreement as a purely economic instrument might represent a neutral observation that would not necessarily tip the scales in favour of either party.\textsuperscript{109} The same cannot be said for the interpretation and enforcement of IBAs: An improper characterization of the object and purpose of IBAs risks implicitly accepting the corporate developer’s arguments before even commencing the analysis of the contract’s substance. For example, resolving ambiguities based on notions of commercial reasonability or assessing the behaviour of the parties by the standards of self-interested market participants may ultimately give effect to the developer’s perspective while diminishing the sociocultural objectives that were integral to the parties’ bargain.

As alluded to in Part I, \textit{Nexgen} highlights the risks of an uncritical approach to characterizing IBAs. Although it concerned the breakdown of negotiations rather than the enforcement of a concluded IBA, it is one of the few cases dealing directly with this form of contracting. The plaintiff, Métis Nation – Saskatchewan, alleged the breach of a preliminary agreement to negotiate an IBA in good faith and brought an application for an interlocutory injunction. While the court accepted that the claim presented a serious issue to be tried, the application failed at the subsequent stages of the test for interlocutory injunctions. Notably, when assessing the potential for irreparable harm, the Court of King’s Bench for Saskatchewan (then known as the Court of Queen’s Bench) spent relatively little time evaluating the nature of the interests at stake and the complex purposes of IBAs. Instead, the court asserted that

\begin{quote}
the underlying claim is a garden variety contract dispute between private parties. The circumstance that precipitated the action was a breakdown in negotiations toward an IBA. The purpose of the IBA is to settle the economic benefits that would flow to Métis Nation – Saskatchewan if the Project proceeds. Economic benefits are, by definition, capable of quantification in monetary terms.\textsuperscript{110}
\end{quote}

\begin{footnotes}
109. However, this depends on the particular context. For a brief review of contract law trends, see McCamus, \textit{supra} note 45 at 23-27.
110. \textit{Nexgen}, \textit{supra} note 47 at para 92.
\end{footnotes}
Even if negotiations proceeded more narrowly in this particular case, it should be recognized that if such a characterization were to be accepted more generally in IBA disputes, it would represent a fundamental misunderstanding of the role of IBAs as cultural, environmental, and relational instruments. The inability to secure monitoring powers, environmental mitigation measures, protocols on the discovery of Indigenous objects, and anti-discrimination policies for employment cannot be contained within the court’s characterization of IBAs. Although the court’s overall conclusions may not have changed in this case, a more sensitive analysis of the nature of the dispute was warranted.

However, the court’s approach is not entirely surprising. Rather, it is a predictable outcome of applying the lens of traditional commercial contracting to a context that is wholly different and, in so doing, courts are more likely to filter out the constitutional backdrop and the multidimensional objectives of modern IBAs, in favour of a commercial conception of such agreements. Indeed, in Nexgen, the court was unwilling to imagine how other areas of law might influence its approach to contractual analysis: It noted that constitutional claims were not directly raised, without reflecting on the ways in which IBAs disturb traditional boundaries between private and public law. While courts might remain constrained by the structures of private law, there may be opportunities for a more sensitive appreciation of IBAs. To that end, even slight progress could have a significant impact on Indigenous parties. It is therefore imperative to consider how alternative approaches to contract law could enable decision makers to meaningfully engage with the sui generis nature of IBAs.

III. THE INTERPRETATION AND ENFORCEMENT OF IBAS

A. THE ROLE OF CONTRACT LAW RULES

Part II has pointed to the need to infuse contract law with Indigenous perspectives and public law approaches. The question therefore becomes how particular contract law doctrines can serve to realize these aims. As previously noted, there is a lack of public jurisprudence on the interpretation and enforcement of IBAs, which could be attributed to the inclusion of arbitration and confidentiality

111. Indeed, the nature of the injunction sought by the plaintiff fit uneasily with the rights that it had been accorded via the preliminary agreement to negotiate (ibid at paras 95-96).
112. For a more thoughtful (albeit still imperfect) approach, see QIA Arbitration, supra note 106.
113. See Nexgen, supra note 47 at para 91.
clauses, along with the relative novelty of the IBA regime itself. This means that scholarship can fill a void by guiding decision makers through the complicated questions involved in interpreting and applying IBAs. Answering these questions requires a preliminary discussion of contract law itself: What underlies the body of rules and principles that regulate the formation, performance and extinction of agreements between parties?

Contractual rules and principles are not developed or applied in the abstract. Rather, they serve particular functions within the overarching area of contract law. One undercurrent of contract law is the protection of the reasonable expectations of the parties. As Lord Steyn explained, “A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract.” Whether by searching for the parties’ intention through contractual interpretation or recognizing the limits of discretion through good faith, the tools of contract law help to preserve and enforce the bargain reached by the parties; the bargain being the careful equilibrium found within the agreement. In this sense, particular rules remain connected to their underlying function. Indeed, as John McCamus notes, there is a trend in contract law away from black-letter formulations and towards “a search for the underlying principle.”

At the same time, contract law is supplemented by assumptions about the parties’ intentions and expectations that were developed for commercial disputes. For example, the principle that contracts should be interpreted to promote commercial reasonableness uses this concept as a proxy for the parties’ intentions because “doing so is more likely than not to give effect to the intention of the parties.” In most cases, aligning contract law rules with commercial reality is beneficial because it represents an accurate approximation of parties’ expectations in a commercial setting. However, this article highlights the ways in which IBAs are sui generis contractual instruments that differ in significant ways from

114. On the subject of confidentiality clauses, see Hummel, supra note 9 at 371. The relative absence of public conflict could suggest that the outcomes of IBAs have been positive; however, it could also reflect the dispute resolution provisions in most Canadian IBAs, which often prioritize committee deliberation followed by mediation and private arbitration.
117. McCamus, supra note 45 at 26.
118. Resolute FP Canada Inc v Ontario (Attorney General), 2019 SCC 60 at para 142.
ordinary private contracting. In this sense, an uncritical application of contract law that does not question the soundness of any underlying assumptions would risk prioritizing the developer’s subjective perspectives, rather than the actual equilibrium reached by the parties.

Thus, in order for contract law to fulfill its functions, it is necessary to ensure that existing rules and principles are applied in a contextually sensitive manner. This does not mean rejecting or transforming doctrines. There is sufficient flexibility in the selection of interpretive tools, and in the understanding of good faith duties, to allow them to take their colour from context. As Canadian courts have recognized, contract law rules should not be applied formalistically.119

The unique background for IBA contracting provides useful guidance on how existing contract rules can be applied to properly give effect to the agreement. For example, insofar as IBAs exist in the shadow of constitutional dynamics, the application of private law principles can, where possible, be approached in a way that harmonizes them with public law developments. Similarly, the relational and sociocultural foundations of IBAs present a unique vision of contracting that cautions against purely commercial understandings. Moreover, this article has highlighted the flawed quality of the consent provided by Indigenous communities. IBAs can sometimes act as ultimatum agreements, and their legitimacy is therefore heavily dependent on parties’ implementation and on decision makers’ approach to resurfacing Indigenous perspectives. While contract law is founded on freedom of contract, it has become more attuned to inequalities in bargaining power that destabilize traditional assumptions.120 A growing body of work has also focused on the relational aspects of contracting.121 IBAs are particularly well-suited to such a theoretical lens. At a more practical level, the recognition of a distinction between discrete and relational contracts in Canadian jurisprudence122 provides an opening to acknowledge the relational nature of IBA contracting, as will be explained when discussing good faith. A sensitive approach to the IBA context therefore fits within this broader jurisprudential and doctrinal evolution.

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119. Regarding contractual interpretation, see e.g. Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53 at para 47 [Sattva Capital].
120. The evolution of the doctrine of unconscionability is one such example: see Uber Technologies Inc v Heller, 2020 SCC 16 at para 54.
122. See e.g. Bhasin v Hrynew, 2014 SCC 71 at para 69 [Bhasin].
Nevertheless, adapting existing frameworks to novel situations is not an easy exercise. For example, over the past years, courts have dealt with injunction applications against Indigenous protesters and have had the difficult task of channelling delicate issues into traditional legal frameworks.123 The reconciliation of common law principles with Indigenous legal perspectives is, as one judge recognized, only in early development.124 The difficulty experienced in other contexts indicates the need for scholarly guidance on the application of key contract law principles in order to protect the IBA parties’ reasonable expectations.

It is worth acknowledging that the parties’ respective expectations are not necessarily identical or independently representative of the reasonable expectations flowing from the IBA. The Indigenous party may have different perspectives on the value of the resource project, the nature of the Indigenous group’s claim to land, and the dynamics of the relationship that should ultimately flow from the agreement. However, the interpretation and application of a contract follows an objective approach125 and must therefore reconcile these perspectives to give effect, as much as possible, to the compromise at the heart of the bargain struck between the parties.

As previously explained, IBAs sit at the intersection of empowerment and oppression, and care must be taken not to tilt the balance towards the latter. It should not be forgotten that Indigenous perspectives are part of the bargain struck within the IBA. Indigenous expectations of what they will receive from the agreement—and from the developer’s conduct—might not rise to the level of what they believe they deserve or aspire towards, since environmental, cultural, and social preoccupations are necessarily tempered by the context of negotiations and the corresponding fragility of Indigenous consent. Nevertheless, such considerations do occupy critical portions of the ultimate agreement. Reasonable expectations on sociocultural issues are clearly present within IBAs and contract law must play a role in protecting them.

As for the corporate developer, it might be argued that a less commercial approach to interpreting and applying the contract would be inconsistent with the developer’s profit-focused intentions. Admittedly, motivations underlying the developer’s conduct likely involve a cost-benefit analysis, wherein securing Indigenous support and reducing the prospect of Indigenous protest, opposition, and litigation will facilitate progress on a profitable project while mitigating

123. See e.g. Teal Cedar Products Ltd v Rainforest Flying Squad, 2021 BCSC 605; Foxgate Developments Inc v Jane Doe, 2022 ONSC 7035.
124. See Coastal GasLink Pipeline Ltd v Huson, 2019 BCSC 2264 at para 139.
125. See Sattva Capital, supra note 119 at para 55.
reputational harm.\textsuperscript{126} At the same time, shifts in developer behaviour are occurring in an era of increased scrutiny of corporate conduct. For example, the Truth and Reconciliation Commission's Calls to Action demand that the corporate sector pursue meaningful engagement before commencing resource development in order to secure free, prior, and informed consent—a concept also enshrined in article 32 of the \textit{United Nations Declaration on the Rights of Indigenous Peoples}.

\textsuperscript{127} While corporate directors' fiduciary duties are to the corporation, they are expressly empowered by law to consider broader aims, such as the environment.\textsuperscript{128} In that vein, public pronouncements are often made to loftier aims: For example, DeBeers Canada Inc. reported on its IBA-related interactions within the human rights section of its sustainability report and connected it to corporate sustainability expectations.\textsuperscript{129}

One should, of course, be highly skeptical of claims that corporations' motives have shifted. Ultimately, the long-term goal of developers negotiating such agreements is connected to profit. However, contract law is not built on a party’s ulterior motives or subjective intentions, particularly when treating the contract as commercial and business-centred would undervalue the perspectives of the more vulnerable party. Put differently, assuming the worst about the corporation's motives, and framing the agreement on this basis, would end up benefitting this very corporation by skewing the interpretive analysis and reducing the intensity of good faith duties. Developers cannot tie IBAs to social responsibility in public while expecting to be judged based purely on commercial norms in the courtroom. Instead, the parties should be held to the objective bargain that they struck, and to the premises inscribed within the agreement: Regardless of the corporate developer's motives for contracting, the IBA itself reflects a balancing of purposes and interests. Indeed, in a multitude of IBAs, the preamble and objectives sections do not speak of self-interest, but of collaboration in the pursuit of economic, social, cultural, and environmental goals. Contract law is designed to give effect to this negotiated compromise, not the indirect aims of the developer.

Taken together, while the parties' expectations are complex and may diverge, the bargain found within each individual IBA reconciles these perspectives, and

\begin{thebibliography}{9}
\bibitem{126} See \textit{e.g.} Gogal, Riegert & Jamieson, \textit{supra} note 105 at 130-43; Dianne Lapierre, \textit{Corporate Rationales for the Use of Impact and Benefit Agreements in Canada’s Mining Sector} (MA Thesis, University of Guelph, 2008).
\bibitem{127} \textit{TRC Calls to Action}, \textit{supra} note 4, art 92; \textit{UNDRIP}, \textit{supra} note 4, art 32. See also Mouyal, \textit{supra} note 42 at 50-52.
\bibitem{128} \textit{See Canada Business Corporations Act}, RSC 1985, c C-44, s 122(1.1)(b).
\bibitem{129} \textit{See Craik, Gardner & McCarthy}, \textit{supra} note 17 at 383.
\end{thebibliography}
reasonable expectations thereby flow from it. Insofar as contract law serves to protect these reasonable expectations, its rules should be approached sensitively in order to give effect to them. Part III therefore considers how particular contract law doctrines can properly be applied in the IBA context.

To that end, Part III analyzes two areas that show promise. First, it proposes a contextually sensitive approach to contractual interpretation. In particular, while remaining grounded in the text of the agreement, decision makers should adopt a practical approach that eschews interpretive rules based purely on commercial reasoning, that acknowledges the influence of public and Indigenous sources in shaping the content of the parties’ promises, and that gives due weight to specific guidelines included within IBAs. Second, it examines the development and normative underpinnings of good faith. In so doing, it demonstrates that the behaviour of corporate developers at the negotiation and performance stage should be scrutinized in a manner that is alive to Indigenous perspectives and expectations.

In each subsection, the article prioritizes the extension and refinement of existing principles, recognizing that those most likely to examine IBAs are arbitrators and superior court judges who may be reluctant to radically alter the shape of contract law. In this sense, the following sections propose a path that pushes the boundaries of contract law while remaining cognizant of its limits.

B. CONTRACTUAL INTERPRETATION

In order to enforce IBAs and assess the parties’ performance, it is essential to properly interpret their provisions. This exercise, however, carries unique dangers in the IBA context and warrants a sensitive approach to interpretation.

As a preliminary remark, it is worth acknowledging that there are limits to the interpretive exercise and that a generous interpretation is unlikely to repair imbalances at the negotiating and drafting stages. Thus, when negotiating the terms of the IBA, counsel should carefully consider the wording of the agreement and properly advise their clients in order to protect parties’ respective expectations. To the extent possible, this must be done in light of the inequality in bargaining power and the lack of effective mechanisms to oppose the development project. Nevertheless, questions of interpretation remain highly relevant. Given that the conclusion of IBAs may occur within short timeframes and before all details are known about a project, parties may be forced to rely on broader standards of conduct alongside consultation and collaboration obligations to protect their
expectations in some areas. Faced with a heightened level of uncertainty, even narrowly defined clauses may lead to diverging interpretations when subjected to unforeseen circumstances.

Moreover, there are unique drafting challenges in the IBA context that should be considered by adjudicators when interpreting the agreement. In substance, IBAs can be viewed as a fusion of settler and Indigenous traditions. As Part II highlights, modern agreements sometimes incorporate Indigenous environmental standards on resource management while clarifying the use of traditional knowledge. Similarly, the establishment of committees for consultation, communication, and discussion can encourage the parties to engage in the spirit of collaboration and reciprocity, thereby moving the agreement closer to a relational dynamic informed by the Indigenous party’s preferences. However, the agreement’s pluralist quality is thereafter channelled into a form of contracting developed by settlers and concretized within a language imposed upon Indigenous peoples. As Tyler McCreary explains,

[a]dopting legal forms recognizable to the colonizer demonstrates one way that Indigenous people find agency within a colonial system; however, the forms of recognition accorded by colonial regimes remain selective, channeling the expression of Indigeneity into the forms most reconcilable with the legalities of capitalist political economy.

As a result of this filtering exercise, there is a risk that the corporate developer’s perspective is elevated by the text and structure of the contract.

For example, on the subject of language, the use of English in most IBAs conveys a particular understanding of obligations through its syntax and structure. James (Sákèj) Youngblood Henderson has written extensively about the relationship between language and legal thought. When analyzing Míkmaq worldviews and Algonquian languages more broadly, he explained:

130. See e.g. Odumosu-Ayanu, supra note 20 at 224; Sosa & Keenan, supra note 6 at 18.
131. See e.g. QIA Arbitration, supra note 106.
132. IBAs, if properly enforced, might help to shift the parties’ interactions towards recognizing their interdependence and promoting relational engagements based on reciprocity. On the subject of relationality, see e.g. Alan Hanna, “Reconciliation through Relationality in Indigenous Legal Orders” (2019) 56 Alta L Rev 817 at 828-839, DOI: <https://doi.org/10.29173/alr2524>; Kirsten Manley-Casimir, “Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law” (2016) 61 McGill L J 939 at 968-70, DOI: <https://doi.org/10.7202/1038493ar>; John Borrows, Canada’s Indigenous Constitution (University of Toronto Press, 2010), ch 3 [Borrows, Canada’s Indigenous Constitution].
133. McCreary, supra note 5 at 191.
The Algonquian peoples are verb-oriented. Unlike most Europeans, they do not have a noun-oriented language that creates divisions or dualities. Their pursuit is to be with the flux, to experience its changing form, to develop a relationship with the forces, and thus to create harmony. Their language and thought are an attempt to learn from being part of the flux, to create a complementary and harmonious relation with nature, to experience the beauty of the moment, and to release such inspirations back to where they came from without fear of loss....This is the vital context of their worldview and life.  

Through this lens, the structure and syntax of each language are intrinsically linked to communities’ worldviews; its features therefore embody and shape the Indigenous party’s values, expectations, and perceptions of responsible conduct. During IBA negotiations, these concepts and concerns would likely be shared with the developer, since dynamic and lengthy interactions can provide time for complex ideas to be expressed and understood by the parties through verbal translation and non-verbal cues. In contrast, when the obligations are reduced to standard contractual wording, ideas and values that were shared by the Indigenous party and that formed part of the contractual equilibrium risk being distorted.  

In a sense, this difficult translation exercise reinforces the fragile nature of IBAs. They can offer a path to further participation with safeguards founded on community values, yet they simultaneously run the risk of reproducing capitalist structures. These contradictions mirror the ways in which IBAs can both further and hinder self-determination. While decision makers are not, of course, involved in this broader conversation, they are tasked with interpreting individual IBAs. This requires a proper understanding of what these agreements are intended to achieve and how the parties’ complex expectations have been translated on paper.  

However, even if adjudicators are open to considering the surrounding circumstances, established rules caution against using evidence of negotiations and of a party’s subjective intentions to interpret the contract. Thus, it may be difficult to resurface ideas that are entirely absent from the text of the agreement. Nevertheless, within the text, broad clauses and standards of conduct may raise

136. See e.g. McCamus, supra note 45 at 805-13.
interpretive issues and merit a culturally sensitive approach to interpretation. The question for the following subsections therefore becomes whether the aspirations of IBAs can be protected at the interpretation stage while operating within the constraints placed on decision makers.

1. SOURCES OF GUIDANCE: FROM SATTVA TO MOSES

In Canadian common law, the Supreme Court’s decision in *Sattva Capital Corp v Creston Moly Corp* provides an appropriate starting point for the interpretive analysis. Alongside analyzing the proper standard of review, the court considered the role of context in contractual interpretation. Justice Rothstein highlighted that “[c]onsideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning.” Such a shift is welcome in the IBA context; however, the Supreme Court also cautioned that “[t]he interpretation of a written contractual provision must always be grounded in the text…While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.” Appellate courts have echoed this limitation in subsequent years. Thus, questions remain as to the relative weight that should be placed on the surrounding circumstances, as well as which contextual indicators should be most salient. Moreover, such questions cannot be answered in the abstract, and tailored guidance may be necessary in the IBA context.

To that end, adjudicators could seek inspiration from Canadian courts’ approach to interpreting modern treaties concluded with Indigenous nations. Admittedly, IBAs are not constitutional instruments protected by section 35 of the *Constitution Act, 1982*, nor is their purpose nearly as broad. Nevertheless, for questions of interpretation, there are similarities which indicate that the task

137. *Sattva Capital*, supra note 119 at para 47.
138. Ibid at para 57.
139. See e.g. *Keephills Aggregate Company Limited v Riverview Properties Inc*, 2011 ABCA 101 at para 13: “The law does not license a judicial exploration of the negotiations of the parties in pursuit of the agreement that the court assumes would best balance the parties’ respective interests.”
140. See e.g. *Moses*, supra note 41; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*]; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*].
142. However, for an innovative argument that the benefits contained within IBAs deserve constitutional protection, see Roth, supra note 11 at paras 36-41.
of contractual interpretation could be informed by considerations contained within jurisprudence on the interpretation of modern treaties.

First, even if IBAs are limited to a particular extraction project, they share some of the purposes of modern treaties (albeit in narrower form). Although linked to the life of the project, IBAs remain long-term, relational instruments designed to incorporate cultural, social, and environmental aims. Even if the parties’ relative emphasis on economic and non-economic concerns may differ, both have struck a bargain that involves the creation of institutions designed to facilitate dialogue, as well as ongoing commitments on environmental and sociocultural issues, in exchange for some level of consent or purported social license to operate. More importantly, specific clauses that have led to interpretive disputes in modern treaties are also common in IBAs. For example, wildlife preservation procedures and consultative obligations were the subject of the Court of Appeal of Québec’s analysis in *Corporation Makivik v Québec*. Provisions that address somewhat similar issues can be found in a variety of existing IBAs. This suggests that although IBAs remain distinct, disputes over their interpretation could benefit from the guidance provided within similar cases in the modern treaty context. With the necessary adaptations, courts’ insights on modern treaty interpretation could therefore help to fill the jurisprudential gap concerning the interpretation of IBAs.

Second, Part II(A) highlights the interplay between IBAs and public duties, and the state-like roles undertaken by developers in fulfilling the duty to consult and providing public services. From this lens, IBAs remain inextricably linked to public law and might benefit from an interpretive approach that acknowledges this dimension. Conversely, the Supreme Court of Canada has tended to adopt a somewhat contractual perspective of modern treaties. While recognizing the unique nature of modern treaties, Justice Binnie wrote in *Québec (AG) v Moses* that “[t]he contract analogy is even more apt in relation to a modern comprehensive treaty….The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties.” In this sense, modern treaties are constitutional instruments that arguably incorporate contractual dimensions. Given that IBAs are contractual instruments formed in the shadow of constitutional duties, they could benefit from a parallel approach to interpretation.

143. *Corporation Makivik*, supra note 41 at paras 58-68.
144. See e.g. *Meadowbank Mine IIBA*, supra note 29, Schedule K.
146. See *Moses*, supra note 41 at para 7.
Finally, it is worth noting that the interpretation of modern treaties is largely consistent with courts’ approach to contractual interpretation. Indeed, in the modern treaty context, courts have emphasized the importance of focusing on the text of the agreement.\(^\text{147}\) Admittedly, this approach has been criticized by some scholars,\(^\text{148}\) but insofar as it mirrors the limits imposed in private settings, courts’ approach to modern treaties facilitates the task of applying its guidance to IBAs. Thus, the use of principles from modern treaty interpretation does not require significant deviation from contractual jurisprudence; rather, the nuances and insights derived from this setting can serve to clarify and inform the use of the surrounding circumstances when interpreting IBAs. Indeed, the guidance provided in these cases can simply inform the lens through which courts apply existing contract law doctrines to IBAs. This is necessary because the parties’ intentions and reasonable expectations are intertwined with the Aboriginal law context. Thus, decision makers’ application of interpretive rules should take its colour from this context.

More specifically, the Supreme Court has highlighted that “a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted ‘in an ungenerous manner or as if it were an everyday commercial contract’” and has recognized that a sensitive approach to contractual interpretation can “help ensure that modern treaties will advance reconciliation.”\(^\text{149}\) This perspective is equally applicable to the IBA context, since IBAs have a significant effect on social, cultural, and environmental interests that would need to be preserved in order for reconciliation to have meaning. By acknowledging the elevated stakes underlying interpretive disputes, alongside IBAs’ true character, courts can faithfully apply existing contractual principles while being guided by the lessons of public law jurisprudence.

2. THE PRACTICAL IMPLICATIONS OF A TAILORED APPROACH

When considering the practical implications of a generous, non-commercial approach to IBA interpretation, several important consequences emerge. Importantly, in light of the multifaceted purposes of IBAs, decision makers should be wary of approaches to resolving ambiguities that are premised

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147. See ibid at paras 6-7; Little Salmon, supra note 141 at para 12. See also Janna Promislow & Alain Verrier, “Judicial Interventions in Modern Treaty Implementation: Dispute Resolution and Living Treaties” (2019) 6:2 Northern Public Affairs 52 at 54.
148. See e.g. Newman, supra note 145 at 484-85.
149. Nacho Nyak Dun, supra note 140 at paras 37-38.
on purely commercial contracting. In particular, decision makers should refrain from formalistically relying on notions of commercial reasonability, which are sometimes referenced in existing jurisprudence. For example, in *Consolidated-Bathurst Export Ltd v Mutual Boiler & Machinery Insurance Co*, Justice Estey explained that

> [w]here words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.\(^{150}\)

References to sound business principles and commercial absurdity have helped to resolve ambiguities in a variety of other cases.\(^{151}\) Such a rule is understandable in a standard commercial context because it can reasonably be assumed that the parties did not intend a commercially unreasonable result. In this sense, it allows the court to respect the true intentions and expectations of the parties.

However, in the IBA context, such an approach might lead to discarding valid interpretations that further the sociocultural aims of the agreement, out of concern that they would force the developer to temper its economic interests. Given that IBAs interact with public duties and that corporate developers frequently undertake state-like responsibilities—including funding public services, supporting community infrastructure, and developing cultural programs—it would be inappropriate to interpret clauses through a purely commercial lens. Employing such a rule in the distinct cultural context of IBA contracting would undermine the decision maker’s ability to faithfully uncover the actual bargain reached by the parties.

The notion of avoiding assumptions derived from commercial contracting is consistent with the Supreme Court’s approach to interpreting provisions in light of their surrounding circumstances, which would reasonably include the multifaceted nature of the agreement.\(^{152}\) Moreover, this approach aligns the interpretation of IBAs with the Supreme Court’s explicit guidance in the modern treaty context. Like modern treaties, IBAs should not be treated as “everyday commercial contract[s],” insofar as they are focused on “building relationships” throughout the life of a project on traditional territory.\(^{153}\)

\(^{150}\) [1980] 1 SCR 888 at 901.  
\(^{151}\) For an overview of this principle of construction, see McCamus, *supra* note 45 at 719-22.  
\(^{152}\) See *Sattva Capital*, *supra* note 119 at para 47.  
\(^{153}\) See *Little Salmon*, *supra* note 140 at para 10.
The reasoning in *Qikiqtani Inuit Association v Baffinland Iron Mines Corporation*, one of the few publicly available arbitration decisions concerning IBAs, provides a helpful—if imperfect—example of a sensitive approach to interpretation. Indeed, this decision shows that it is possible to remain faithful to existing jurisprudence while taking the character of IBAs seriously. The central issue concerned the interpretation of “Commercial Production,” because the parties’ diverging perspectives affected the continuation of Advance Payments.\(^{154}\) Alongside assessing the factual matrix and plain meaning of the words used, the arbitrators considered an argument made by the developer founded on business efficacy. While the arbitrators appeared more receptive to such a consideration than this article advocates, they also quickly turned to the purposes of the agreement. In so doing, they recognized that “[w]hile not expressly stated in the IIBA we accept the premise that one of the purposes intended for Inuit financial participation in the Project was to benefit Inuit by providing the resources necessary to address such consequences as disruption of wildlife, aggravation of social problems and amelioration of environmental and socioeconomic impacts of the Project.”\(^{155}\) Thus, despite the developer’s argument, the arbitrators were of the view that Advance Payments represented a “minimum payment to be made in any event of Project size or the length of delays in Project construction” and that the large cap on Advance Payments represented “an assurance that the consideration under the IIBA will be sufficient to ensure remediation of Inuit lands, environmental harm and socio-economic impacts.”\(^{156}\) In so doing, the arbitrators wisely rejected an approach that treated IBAs as typical commercial agreements.

Alongside the rejection of interpretive rules developed for commercial contexts, a generous approach to contractual interpretation could entail recognizing the interplay between specific provisions and public or Indigenous sources.\(^{157}\) In particular, IBAs frequently impose consultation and collaboration obligations on the resource developer, whether in crafting environmental management plans, using traditional knowledge, or participating in committee structures.\(^{158}\) Such terms are not always defined and even when a definition section is provided, it may not be sufficiently responsive to the particular circumstances of the dispute.

\(^{154}\) See *QIA Arbitration*, supra note 106 at paras 108-12.

\(^{155}\) *Ibid* at para 218.

\(^{156}\) *Ibid* at para 220.

\(^{157}\) This reflects the guidance in the modern treaty context that agreements should not be interpreted in an ungenerous manner: *Little Salmon*, supra note 140 at para 10.

\(^{158}\) For a sampling of consultation-related obligations, see *e.g.* *Whale Tail IIBA*, supra note 74, ch 8.3.3; *Raglan Agreement*, supra note 12, s 11.7; *Meadowbank Mine IIBA*, supra note 29, Schedule L3; *Pinehouse Agreement*, supra note 7, Schedule F17.
Where questions exist as to the scope of consultation or collaboration required, it may be helpful for adjudicators to acknowledge the role of IBAs in fulfilling the Crown’s duty to consult: Indeed, the private developer’s de facto assumption of responsibility for consultation is effectively channelled into continuing obligations to consult set out in the agreement. Consequently, such obligations should not be interpreted narrowly, divorced from their context; instead, they can be informed by constitutional and Indigenous perspectives. To that end, adjudicators could seek inspiration from the approach put forward by the Court of Appeal of Québec in Corporation Makivik v Québec. The Court of Appeal adopted a “historical and teleological analysis” to interpret the provisions of the modern treaty at issue; the court recognized that consultation “cannot boil down to a procedure to follow; it also requires a sufficiently open mindset to render it meaningful,” and that such guidance was equally applicable to consultation obligations prescribed by specific provisions within the agreement.159

Adopting a similarly robust approach for collaboration and consultation provisions within IBAs would not require deviating from the agreements’ text. To the contrary, any such consultation or collaboration obligations remain fully anchored in the text. In order to delineate the scope of broad, potentially ambiguous contractual provisions, adjudicators would merely need to consider them in light of the agreement’s surrounding circumstances—a quintessential task of contractual interpretation. Even in purely contractual contexts, courts have recognized that the interpretation of contractual agreements can be informed by factors such as “the genesis, aim or purpose of the contract” and “the nature of the relationship created by the contract.”160 In the case of IBAs, both parties are likely to be aware of the broader dynamics which have brought them together, alongside the relevance of consultation when developing on Indigenous traditional territory. Indeed, the development of the duty to consult and the procedural role for private parties is, in part, what altered corporations’ conduct in engaging with Indigenous communities—thus, it is a critical part of the IBA regime itself and the individual bargains struck by parties. Moreover, courts would not need to inquire into the parties’ subjective intentions or the particular back-and-forth of their negotiations, which might offend existing rules of interpretation.161 Although such an extension might be helpful in the IBA context, it is unlikely to be well-received by adjudicators. Rather, the relevant

159. Corporation Makivik, supra note 41 at paras 76-79.
161. See McCamus, supra note 45 at 805-13.
circumstances would revolve around the overall legal and sociopolitical landscape that brought the parties together in the first place. Such contextual indicators are more likely to fall within the scope of information that “would have affected the way in which the language of the document would have been understood by a reasonable man.”

More broadly, courts should pay attention to explicit guidance provided within individual agreements. For example, section 2.2.2 of the *Whale Tail IIBA* confirms that the “interpretation and implementation by the Parties of their respective obligations under this Agreement shall be guided by Inuit Qaujimajatuqangit (Inuit traditional knowledge).” Similarly, in the *Mary River IIBA*, section 1.11 indicates that the agreement should be “construed in accordance with a purposive approach and pursuant to such remedial and equitable interpretation as will achieve the objectives and purposes stated herein. The interpretation of this Agreement may adapt to changes in circumstances over time in the Project until Project Termination.” These provisions appear to deviate slightly from existing approaches to contractual interpretation, and it might be difficult for parties to argue for them without a textual anchor (which reinforces the importance of careful, strategic drafting). However, where such provisions are wisely included in the agreement, adjudicators must give them full effect and must remain open to novel approaches. Indeed, adhering to the text of the agreement necessarily entails respecting the parties’ choice to view the agreement as dynamic and evolving. Consequently, the inclusion of provisions concerning interpretation can complement the approach set out in this article. These provisions should be given due weight by adjudicators navigating the complex framework of IBAs.

Taken together, it is possible to approach the interpretation of IBAs in a manner that balances commercial understandings with the interests of the Indigenous party, and that seeks inspiration from public and Indigenous sources while remaining respectful of contract law jurisprudence. Admittedly, even with a sensitive approach to interpretation, it may be difficult to avoid the agreement

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163. *Whale Tail IIBA*, supra note 75, s 2.2.2.
164. *Mary River IIBA*, supra note 83, art 1.11.
being filtered through a “Western frame of reference.” Moreover, the proposed approach is unlikely to address the dangers of harmful, but unequivocal provisions. Nevertheless, when interpreting vague provisions, delimiting the scope of broad standards of conduct, or considering the application of clauses to unforeseen events, the foregoing analysis can serve to guide decision makers and provide a feasible approach to interpretation.

C. GOOD FAITH

While interpretation is an important area of study, some disputes may turn not on the meaning of certain provisions, but on the actions of the parties in negotiating or exercising contractual rights. Good faith can play an important role in guiding parties in these circumstances: Put simply, because Indigenous parties do not have anything approaching a veto over resource projects, their ability to gain meaningful contractual protections is highly dependent on the developer’s good faith. In this sense, the degree to which IBAs further or hinder Indigenous participation in the project, and their broader pursuit of self-determination, is influenced by the developer’s approach to negotiation and performance. The following sections argue that the particular nature of IBAs—including the flawed nature of the consent contained therein, their relationship to constitutional duties setting standards of conduct for the Crown, and their multifaceted, relational aims—are critical to understanding the parties’ reasonable expectations. A proper understanding of these shared expectations militates in favour of a robust application of good faith duties.

1. THE NORMATIVE UNDERPINNINGS OF GOOD FAITH

In Bhasin v Hrynew (“Bhasin”), the Supreme Court confirmed the existence of good faith as an “overarching organizing principle,” but recognized that the application of particular doctrines to specific circumstances “calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties.” As scholars further note, although good faith exists “halfway between

166. Bhasin, supra note 122 at para 69.
a fiduciary duty and the duty to refrain from active fraud,” its precise position on this spectrum is not fixed. Moreover, as explored below, heightened scrutiny of the parties’ behaviour is consistent with a context-specific understanding of good faith in the IBA context.

One consideration that weighs in favour of such heightened scrutiny is that many IBAs are long-term, relational agreements. Although IBAs contain a variety of specific obligations related to financial transfers, significant sections are frequently devoted to creating relational structures that will allow for ongoing consultation, adaptive management, and broader adjustments to the operation of the project. In this sense, their ability to foster participation and joint input depends on the continued trust and cooperation of the parties, while specific obligations relating to disclosure and reporting serve primarily as a foundation for more open-ended discussions. Even the employment provisions typically serve as a multi-factored framework agreement through which individual employment contracts, which have also been characterized as relational, are thereafter negotiated and concluded. The characterization of the contract is relevant to the scope of good faith: The Supreme Court has recognized that relational contracts may entail different obligations than discrete transactional contracts. Nevertheless, as highlighted in Wastech Services v Greater Vancouver Sewerage and Drainage District (“Wastech”), such a categorization does not necessarily mean

167. Saul Litvinoff, “Good Faith” (1997) 71 Tul L Rev 1645 at 1668. Although the aforementioned article focuses on the civil law context, the distinction between good faith and fiduciary duties is also present in the common law. See Paul Daly, “La bonne foi et la common law: l’arrêt Bhasin c Hrynew” in Jérémie Torres-Ceyte, Gabriel-Arnaud Berthold & Charles-Antoine M Péladeau, eds, Le dialogue en droit civil (Les Éditions Thémis, 2018) 89.

168. See Bhasin, supra note 122 at para 69. See also Daniele Bertolini, “Toward a Framework to Define the Outer Boundaries of Good Faith in Contractual Performance” (2021) 58 Alta L Rev 573.

169. See Northwest Territories, supra note 6 at 8-9, 13.

170. Churchill Falls (Labrador) Corp v Hydro-Québec, 2018 SCC 46 at para 67 [Churchill Falls].

that self-interested behaviour is a breach of good faith, particularly where the circumstances in dispute were foreseen by the parties.\textsuperscript{172}

Beyond the type of contract, multiple factors present in the IBA context support careful scrutiny of the parties’ conduct through the lens of good faith. Daniele Bertolini has posited that the outer boundaries of good faith duties cannot be determined in the abstract; instead, they are influenced by transactional variables present in the circumstances, including the sophistication of the parties, the level of uncertainty at the time of formation, and the commercial or non-commercial nature of the contract.\textsuperscript{173} Each of these elements bolsters the case for a stringent application of good faith doctrines in the IBA context. First, although both parties can be viewed as sophisticated and both benefit from legal counsel during the process, Part I demonstrates that IBAs exist at the intersection of empowerment and oppression; the fact that Indigenous opposition is unlikely to stop a project highlights the structural vulnerability of the Indigenous party. This, in turn, suggests that to protect the balance of the bargain reached by the parties, adjudicators may need to closely scrutinize the developer’s behaviour and its exercise of discretionary powers, should a dispute arise. Second, the fact that IBAs are frequently concluded before the project has begun, and sometimes before a final environmental assessment, means that the parties are unable to predict many contingencies when outlining the scope of contractual rights. In the face of disputes between the parties that could not be explicitly addressed by \textit{ex ante} terms, good faith may take on an outsized role.\textsuperscript{174} Moreover, some parties may lack the ability to effectively monitor the developer’s conduct at each stage of development; thus, some groups are acutely dependent on the developer’s continued good faith and information-sharing during the life of the project. Monitoring mechanisms and capacity are important factors behind diverging IBA outcomes.\textsuperscript{175} Finally, this article has suggested that IBAs encompass a range of sociocultural purposes. Just as personal contracts result in “a deeper sense of loss than that experienced by firms or other business organizations in commercial contracts,”\textsuperscript{176} the behaviour of the developer has long-term environmental and cultural consequences for entire communities. Given the nature of the agreement and the consequences of bad faith, the conduct of the parties fits uneasily within

\begin{itemize}
\item \textsuperscript{172} See \textit{Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District}, 2021 SCC 7 at paras 102-03 [\textit{Wastech}]. Although the contract was characterized as relational, this did not appear to play a significant role in the analysis.
\item \textsuperscript{173} See Bertolini, \textit{ supra} note 168 at 602-08.
\item \textsuperscript{174} \textit{Ibid} at 619.
\item \textsuperscript{175} See \textit{e.g.} O’Faircheallaigh, “Monitoring Instruments,” \textit{ supra} note 7.
\item \textsuperscript{176} Bertolini, \textit{ supra} note 168 at 607.
\end{itemize}
the limited lens of commercial morality and would benefit from additional judicial scrutiny.

At a broader level, good faith is, at its core, a normative concept. It follows that adjudicators should be alive to the distinct normative context in which IBAs are concluded and performed. Good faith is often characterized as reflecting a “social norm of behaviour” insofar as it posits an objective assessment of contractual conduct based on community norms.\(^\text{177}\) For example, in \textit{Bhasin}, the court made brief reference to the Supreme Court of Nova Scotia’s decision in \textit{Gateway Realty v Arton Holdings}, where Justice Kelly focused on “community standards of honesty, reasonableness or fairness.”\(^\text{178}\) Although Justice Kasirer grounded good faith doctrines in the expectations of the parties in \textit{Wastech},\(^\text{179}\) the scope of judicial intervention remained premised on assumptions about behaviour in commercial settings. Justice Kasirer stated that “[t]he common law recognizes that ‘[c]ompetition between businesses regularly involves each business taking steps to promote itself at the expense of the other.…Far from prohibiting such conduct, the common law seeks to encourage and protect it.”\(^\text{180}\) Thus, although good faith is tailored to the parties’ objective expectations, it appears that these expectations are supplemented by broader ideals related to the commercial community that are presumed to be shared by the parties.

Such a presumption is largely sound in commercial disputes. Applying good faith in a different way might run counter to the parties’ expectations, while reinforcing Justice Cromwell’s fears of “ad hoc judicial moralism or ‘palm tree’ justice.”\(^\text{181}\) However, IBAs are unique because they constitute an attempt to reconcile, not only the interests of two parties, but also the worldviews informed by two normative contexts. A commercial approach to good faith might result in imposing a standard that reflects the subjective expectations of the developer, rather than the balance between the parties’ normative perspectives as embodied in the agreement. Courts have recognized that good faith serves to protect the “contractual equilibrium”\(^\text{182}\)—or the bargain reached by the parties.\(^\text{183}\) From this lens, prioritizing commercial assumptions about proper behaviour might disturb


\(^{178}\) \textit{Gateway Realty v Arton Holdings} (1991), 106 NSR (2d) 180 at para 38 (SC (TD)); \textit{Bhasin}, \textit{supra} note 122 at para 38.

\(^{179}\) See \textit{Wastech}, \textit{supra} 172 at para 76.

\(^{180}\) \textit{Ibid} at para 73.

\(^{181}\) \textit{Bhasin}, \textit{supra} note 122 at para 70.

\(^{182}\) \textit{Churchill Falls}, \textit{supra} note 170 at para 125.

\(^{183}\) See \textit{Wastech}, \textit{supra} note 172 at para 93.
this equilibrium. Indeed, it would be impossible to ensure that the developer gave “appropriate consideration to the legitimate interests”\textsuperscript{184} of the Indigenous party without acknowledging that the parties’ interests and priorities are informed by their worldviews. In order to avoid this outcome, courts could allow good faith to take its colour from the delicate balancing of traditions within IBAs themselves.

Courts would not be asked to impose their own moral ideals on the parties. Rather, to properly apply good faith doctrines, they would simply need to recognize that the parties’ interests and expectations extend beyond the economic realm and require the parties to consider their conduct from a broader lens. To illustrate how to approach good faith sensitively in the context of IBAs, the following sections will examine the application of existing duties at the negotiation and performance stage.

2. GOOD FAITH IN CONTRACTUAL NEGOTIATIONS

At the outset, experienced counsel, careful drafting, and the use of IBA toolkits can help to protect Indigenous interests.\textsuperscript{185} Nevertheless, this article has highlighted the disparity between the IBA regime in theory and the practical realities of how IBAs are negotiated and performed. Indeed, Indigenous parties may receive no benefits if the developer chooses to arbitrarily withdraw from negotiating and merely proposes minor accommodations at the environmental assessment stage.\textsuperscript{186} Much remains dependent on the conduct of the corporate developer. The question, therefore, becomes whether the parties must act in good faith at the pre-contractual stage.

Such a question inevitably relates to a broader debate about the applicability of good faith to negotiations, which continues to engage common law scholarship and case law.\textsuperscript{187} In \textit{Martel Building Ltd v Canada} (“\textit{Martel}”), the Supreme

\textsuperscript{184} Bhasin, supra note 122 at para 69.
\textsuperscript{185} See \textit{e.g.} Gibson & O’Faircheallaigh, supra note 36.
\textsuperscript{186} Given the risks that the parties will reach an impasse, Gilmour and Mellett (\textit{supra} note 6 at 399) suggest that developers should continue to advance the regulatory approval process and be prepared to complete that process without an IBA. This means ensuring that all matters involving consultation with the First Nation are fully documented so that the proponent can demonstrate to the regulatory and government authorities what steps were taken to understand and reasonably resolve concerns.
Court did not directly address this issue, but it noted that no jurisprudence had established a pre-contractual duty to negotiate in good faith. Moreover, its reasons for rejecting a duty of care in negligence are relevant to the good faith context as well. Multiple decisions in appellate courts have reinforced the Canadian judiciary’s skepticism towards pre-contractual duties, even after the recognition of good faith in performance in *Bhasin*. It should be noted that the Supreme Court’s references to the civil law in two recent good faith cases could portend a willingness to entertain the extension of good faith to the pre-contractual sphere, given that such a proposition has long been accepted in Québec; however, there is at present no general duty to negotiate in good faith.

Nevertheless, it would be worth considering the possibility of imposing a duty in the limited context of IBA negotiations. An incremental, category-based approach is consistent with the way in which good faith developed for insurance, employment and franchise contracts, and with the Supreme Court’s recognition in *Bhasin* that good faith manifests itself in specific, discrete doctrines. An opening was also provided by the Ontario Court of Appeal in *978011 Ontario Ltd v Cornell Engineering Co*: Although concerned with informational disclosure, the court suggested that a pre-contractual duty may exist in certain circumstances based on relational factors including “[t]he manner in which the parties were brought together, and the expectation that could create in the relying party,” the trust and confidence that has been bestowed upon the parties, and the presence of informational asymmetries. These factors support the existence of a duty of good faith. As examined in the previous section, the transactional variables present in the IBA context colour the parties’ reasonable expectations and indicate that a pre-contractual duty is appropriate. Indeed, the developer’s de facto assumption of responsibility, along with the Indigenous party’s vulnerability

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188. See *Martel Building Ltd v Canada*, 2000 SCC 60 at para 73 [*Martel*].
192. See e.g. *Karim*, *supra* note 178 at paras 272-76.
194. See e.g. *Daly*, *supra* note 168.
and reliance, mirror the focus on expectations and reliance that underlies existing extra-contractual duties.\textsuperscript{196}

At the same time, it remains critical to consider the core policy arguments that courts have expressed to reject the imposition of a general pre-contractual duty of good faith. Although scholarly criticisms of such arguments are compelling, judicial concerns regarding the imposition of a pre-contractual duty of good faith retain some persuasive force in the broader commercial context. However, such concerns are largely inapplicable to IBAs. By removing the obstacles to the imposition of an extra-contractual duty, courts should feel more comfortable imposing a limited duty of good faith in IBA negotiations.

First, courts have regularly expressed concerns that a pre-contractual duty is inconsistent with the adversarial, self-interested nature of negotiations. For example, in \textit{Walford v Miles}, Lord Ackner argued that requiring parties to negotiate in good faith is “inherently inconsistent with the position of a negotiating party,”\textsuperscript{197} while the Alberta Court of Appeal further suggested that “[s]uch a duty seems incompatible with the adversarial nature of negotiations between parties who deal at arm’s length.”\textsuperscript{198} Similarly, when examining the existence of a duty of care in \textit{Martel}, Justice Iacobucci and Justice Major posited that “[t]he primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain… From an economic perspective, some authors describe negotiation as a zero-sum game involving a transference rather than loss of wealth.”\textsuperscript{199} Even if these ideas are accepted in general commercial circumstances, such an understanding should be challenged in the context of IBA negotiations. The constitutional backdrop within which IBAs are concluded also suggests that they should not be negotiated from a purely adversarial stance. Indeed, the corporate developer’s practical assumption of consultative responsibilities implies the need to thoughtfully consider the interests of the Indigenous party. Moreover, IBA negotiations are decidedly not zero-sum: Instead, the resulting agreement is often highly relational, and it is focused on creating governance structures that will benefit

\textsuperscript{196} Reynolds highlights the importance of reasonable expectations and reliance within tort law. See Reynolds, “The New Neighbour Principle,” \textit{supra} note 188 at 98-110.

\textsuperscript{197} [1992] 2 AC 128 at 129.

\textsuperscript{198} \textit{Ko v Hillview Homes Ltd}, 2012 ABCA 245 at para 136 [\textit{Hillview}].

\textsuperscript{199} \textit{Martel}, \textit{supra} note 188 at para 62.
both parties rather than merely transferring wealth.\textsuperscript{200} It would be inconsistent for a collaborative, relational agreement premised on trust and confidence to be negotiated through sharp dealing and dishonesty. In this sense, the imposition of an obligation of good faith is consistent with the expectations of the parties when entering negotiations.

Second, courts have argued that the common law encourages self-reliance\textsuperscript{201} and that courts should not offer “after-the-fact insurance against failures to act with due diligence or to hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities.”\textsuperscript{202} These concerns are inapplicable to the circumstances of IBAs. Indeed, Indigenous parties do not have alternative opportunities to pursue; they did not ask for a resource project to occur on their land (nor did they consent to the Crown’s assertion of sovereignty that made such a project possible).\textsuperscript{203} Consequently, they are reliant on the good faith of the project proponent.

Finally, courts have expressed concerns that assessing negotiating behaviour would “introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct,”\textsuperscript{204} particularly where the potential pre-contractual duty is not “reasonably-well defined.”\textsuperscript{205} A category-based approach that limits the imposition of a duty to the narrow context of IBAs can assuage larger concerns about encouraging litigation or creating unwieldy precedent. Admittedly, the recognition of a pre-contractual duty in one situation may encourage claims in other areas. However, the foregoing analysis

\textsuperscript{200} See \textit{e.g.} \textit{Mary River IIBA}, \textsuperscript{supra} note 83, art 2.1.1. The article observes that:

Underlying the provisions of this Agreement is the principle of mutual benefit, collaboration and consultation for both Inuit and the Company from the Project. Benefits for Inuit shall include financial participation, a comprehensive training strategy, target levels of Inuit employment, capacity building, business opportunities and Inuit content considerations in contracting. To the extent that Inuit achieve these benefits the Company will then be able to rely on efficient, high quality Inuit Firms, a well-trained local work force, Project support and stability.

\textsuperscript{201} See \textit{e.g.} \textit{Cornell Engineering}, \textsuperscript{supra} note 196 at para 32; \textit{Daly}, \textsuperscript{supra} note 167 at 2.

\textsuperscript{202} \textit{Martel}, \textsuperscript{supra} note 188 at para 68.


\textsuperscript{204} \textit{Martel}, \textsuperscript{supra} note 188 at para 70.

\textsuperscript{205} \textit{Hillview}, \textsuperscript{supra} note 198 at para 134.
has highlighted several criteria (including IBAs’ relationship to public duties, their supra-regulatory nature, and their relational, non-commercial provisions) which would rarely be met in other circumstances. Thus, should courts wish to tightly restrict the imposition of pre-contractual duties, they would remain capable of doing so.

Furthermore, it is critical to recognize that courts regularly scrutinize the Crown’s consultation and negotiation with Indigenous peoples. It would therefore not be significantly more burdensome to conduct an adjacent analysis of the developer’s conduct through the lens of private law. Rather, the extension of a duty to IBA negotiations would promote consistency with public law approaches to which courts have grown accustomed.

As for defining the scope of the duty to negotiate in good faith, the IBA context allows decision makers to avoid uncertainties that might hinder a broader recognition of pre-contractual obligations. The combination of recent Supreme Court pronouncements on the duty of good faith in performance, extensive jurisprudence on the duty to consult, and principles within Indigenous legal traditions provide a rich foundation upon which to analyze particular disputes. The guidance flowing from these sources should also be familiar to resource developers, who are presumably aware of section 35 developments and are expected to have informed themselves of the Indigenous group’s perspectives in order to properly negotiate. Thus, these sources are within the contemplation of the parties and serve as a helpful basis for delineating the scope of conduct that respects their reasonable expectations.206

In practice, a pre-contractual duty of good faith in the IBA context would therefore follow established and ascertainable guidance. On the subject of honesty and disclosure, the Supreme Court has articulated an essentially negative duty in the contractual performance context, while recognizing that breaches can occur through “lies, half-truths, omissions, and even silence, depending on the circumstances.”207 A similar rule can be imported to discussions during the pre-contractual stage of IBAs.

Moreover, it is possible to draw on public law approaches to assess the parties’ tactics during negotiations. In Haida, the court clarified that while “mere hard bargaining” would not offend a duty of good faith, “sharp dealing” would

206. For example, in Cree traditions, recourse might be had to the concept of miyo-wicehtowin, which requires individuals and groups to “conduct themselves in a manner such that they create positive good relations in all relationships”: Borrows, Canada’s Indigenous Constitution, supra note 132 at 85.
207. Callow, supra note 191 at para 91.
not be permitted.\textsuperscript{208} Similarly, in the negotiating context, a rigorous exchange of proposals is acceptable, but seeking to exploit the structural disadvantages that Indigenous communities face would fall outside the range of good faith conduct.

Finally, when developers arbitrarily withdraw from negotiations at a late stage, their conduct can be sanctioned as a breach of good faith. The existence of negotiations showing significant promise would have affected the Indigenous party’s exercise of other avenues to challenge the resource project; thus, it is reliant on the developer’s good faith in finalizing the agreement rather than leaving without justification. This is consistent with established pre-contractual duties in other jurisdictions.\textsuperscript{209}

Thus, the combination of private, public, and Indigenous sources would help to provide substance and coherence to the proposed pre-contractual duty, while offering much-needed protection for Indigenous parties negotiating IBAs. Admittedly, there remain challenges to recognizing pre-contractual duties in the common law, even where they are restricted to special circumstances; however, the foregoing analysis has suggested that there exists a narrow opportunity to feasibly do so for IBA negotiations. Moreover, it should be acknowledged that since a contract has not been formed at the negotiating stage, the available remedies would likely be limited to extra-contractual, monetary remedies. In the face of environmental and cultural upheaval from resource development, this is unlikely to adequately compensate for the harms experienced by Indigenous communities in the face of sharp dealing. Nevertheless, the introduction of a narrow duty can have a behaviour-modifying effect on resource developers, by recognizing the obligations that apply to them personally when negotiating with Indigenous peoples. It therefore influences the way in which both parties come to the table in the first place, and better aligns their expectations for the negotiating process. Thus, even an imperfect solution can represent a step forward that improves the chances of arriving at an agreement that is responsive to Indigenous concerns.

3. GOOD FAITH IN CONTRACTUAL PERFORMANCE

The need to tailor good faith obligations to the IBA context is particularly relevant at the performance stage. Even with well-drafted agreements, the implementation of IBAs may be far from perfect: Indeed, there remain concerns that once the agreement is concluded, developers might move away from a

\textsuperscript{208} Haida, supra note 51 at para 42.

\textsuperscript{209} See e.g. Didier Lluelles & Benoît Moore, Droit des obligations, 3rd ed (Éditions Thémis, 2018), at para 249.3.
collaborative approach, despite the mechanisms created within the contract. In this sense, even an agreement with the potential to further self-determination can accomplish the opposite, based on how the parties conduct themselves at the implementation stage. Further, a variety of IBA clauses grant the developer extensive discretion, whether in negotiating employment and service agreements, selecting committee members, or incorporating recommendations. Such provisions would engage the duty to exercise contractual discretion in good faith. As the Supreme Court explained in Wastech, good faith is imposed by law, not as an implied term. Thus, “a discretionary power, even if unfettered, is constrained by good faith. To exercise it, for example, capriciously or arbitrarily, is wrongful and constitutes a breach of contract. Even unfettered, the discretionary power will have purposes that reflects the parties’ shared interests and expectations.”

Justice Kasirer explained that the duty requires contracting parties to “exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or…to exercise their discretion reasonably.”

Two types of IBA provisions can serve to illustrate the requirements of good faith in practice: provisions relating to the modification of the project and the renegotiation of its terms. Provisions expressly granting the developer a discretionary ability to modify, expand, or end the resource project are particularly broad. For example, in the Whale Tail IIBA, clause 11(e)(i) provides the developer with sole discretion concerning “all decisions to commence, pursue, suspend or cease mining on the Property, all decisions regarding methods of operations and all decisions concerning the sale or other disposition of Product.” Similarly, the Pinehouse Agreement recognizes that “[t]he order in which the parties deliver their ‘goods’…clearly matters in the real world of extraction contracting. In the context of most IBA negotiations, the company benefits first and performs later; that is, the First Nation agrees to acquiesce or stay silent through regulatory proceedings (if not stand on a stage and shake hands in front of cameras), and the cheques begin rolling in later.

210. For an analysis of potential monitoring instruments, see O’Faircheallaigh, “Monitoring Instruments,” supra note 7. See also Caine & Krogman, supra note 9 at 84. See also Scott, supra note 28 at 282. Scott recognizes the risk that promised benefits may not be delivered to First Nations, highlighting that the order in which the parties deliver their ‘goods’…clearly matters in the real world of extraction contracting. In the context of most IBA negotiations, the company benefits first and performs later; that is, the First Nation agrees to acquiesce or stay silent through regulatory proceedings (if not stand on a stage and shake hands in front of cameras), and the cheques begin rolling in later.

211. See e.g. Diavik Diamonds Project Socio-Economic Monitoring Agreement, Diavik Diamond Mines Inc, Government of the Northwest Territories & Aboriginal Signatories and Parties, 2 Oct 1999, Appendix A6; Mary River IIBA, supra note 83, art 4.2.3; Pinehouse Agreement, supra note 7, art 4.2, Schedule E, s 10(c).

212. Wastech, supra note 172 at para 62.

213. Ibid at para 63.

214. Whale Tail IIBA, supra note 75, s 11(e)(i).
in its sole discretion, curtail, suspend, interrupt or cancel any Operations as it sees fit.” While the specific wording of each provision may alter its scope, such clauses generally provide extensive discretion.

Admittedly, the assessment of whether the developer’s exercise of its discretion is, to use the vocabulary of the Supreme Court, “unconnected to the purposes underlying the discretion” is difficult in the context of IBAs, which are characterized not by a limited purpose, but by the delicate balance between a multitude of economic and sociocultural purposes. A superficial understanding of the specific discretion to expand, modify, or cease the project could allow any economic purpose to be sufficient. However, given that such decisions could cause significant environmental and cultural harm, thereby distorting the careful balance of benefits provided in the bargain, it is better to understand the range of the discretion as rationally connected to the balancing of interests and considerations embodied in the IBA. Indeed, the developer's project decisions can have ripple effects on a variety of other provisions, from the size of the financial benefits owed to the Indigenous group to the nature of the environmental collaboration between the parties. From this perspective, although economic interests are, understandably, a foundation for the developer's subjective interests, the corporation may nevertheless need to consider how the parties’ expectations were reconciled within the agreement, particularly concerning the mitigation of the project’s cumulative impact. This is consistent with the reasonable expectations of the parties as embodied within the broader framework of the agreement: IBAs do not remove control from the developer, but they establish monitoring and consultation mechanisms that sensitize the developer to the ramifications of its conduct.

In practice, this means the following. First, the developer’s exercise of discretion can still be primarily founded on economic incentives, but it would

215. Pinehouse Agreement, supra note 7, art 11.17(a).
217. It is also consistent with an effort to reconcile the normative perspectives of the developer and the Indigenous group within the agreement. For example, in an agreement with the Anishinabek, adjudicators’ analysis of good faith could acknowledge the perspectives that informed the bargain, including Anishinabek conceptions of stewardship. As Borrows (supra note 132 at 78-79) has explained:

The Anishinabek people have a number of legal principles that guide their relationship with other living beings in a conservationist mode...The Anishinabek have strong legal traditions that convey their duties relative to the world. These are stewardship-like concepts (bimeekumaugewin) and apply to their use of land, plants, and others. Principles of acknowledgement, accomplishment, accountability, and approbation are embedded in the Anishinabek creation epic and associated stories.
need to follow a proper consideration of the impacts of particular development choices on the environmental, social, and cultural well-being of the Indigenous community. Second, its ultimate exercise of the contractual right cannot markedly depart from the balance of purposes anchored in the agreement. Consequently, in extreme circumstances, such as the creation of unforeseen environmental harm or the discovery of Indigenous historical artifacts on an extraction site, the range of reasonable choices connected to the discretion may narrow, and the developer may need to select an option that limits an otherwise profitable endeavour—put differently, the option that pursues profit at any cost may not be reasonable in all cases, particularly where it is wholly disconnected from the balancing of objectives at the heart of the agreement.

It is unlikely that this would extend as far as sacrificing the developer’s economic interests. Even in the civil law, where the concept of good faith is more developed and expansive, the Supreme Court has stated that “[l]ooking out for the interests of the other contracting party does not require a party to sacrifice his or her own interests.”218 However, in the IBA context, a nuanced understanding of the parties’ bargain suggests that balancing economic and non-economic factors is consistent with this bargain. The developer does not have to sacrifice its economic interests, but it has to consider other interests; in extreme circumstances, it also has to temper economic self-interest if its pursuit would demonstrate a disregard for the balance of economic and sociocultural interests promoted by the IBA.

Similar good faith requirements flow from an examination of renegotiation clauses. Many IBAs contain clauses that provide for periodic renegotiation, or negotiations triggered by specific changes. For example, in the Meadowbank Mine Inuit Impact and Benefits Agreement, the parties agreed to review the contract every three years, and to renegotiate if either party were to reasonably conclude that a material change in circumstances had occurred.219 However, the parties have discretion when determining whether to accept proposed modifications.

On the issue of good faith, this might entail a tailored understanding of the other party’s legitimate interests, which extend beyond the parties themselves to the broader relationships within the ecosystem in which development is taking place: see Aimée Craft, “Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)” in John Borrows et al, eds, Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples (Centre for International Governance Innovation, 2019) 101 at 106. Craft highlights that in Anishinaabe law, when considering the impact of our actions, we do not think in terms of parties with a direct interest, but rather we evaluate the many combinations of relationships within a broader web of relationships that exist within Creation.

218. Churchill Falls, supra note 170 at para 35.
219. See Meadowbank Mine IIBA, supra note 29, art 5.1.
and persistent disagreements may lead to a dispute heard before an arbitrator. Some agreements even explicitly use the terminology of good faith when outlining the parties’ obligations related to renegotiating the agreement and considering amendments. In this context, the developer’s decision to renegotiate or to refuse terms does not involve a new duty, but is instead analyzed squarely within the confines of the good faith exercise of contractual discretion.

Subjecting developers to such an analysis would ensure that Indigenous normative perspectives are not sidelined within the assessment of good faith. As James Tully explained, in the treaty context, “These conciliatory negotiations are never perfect. They are activities in which the participants learn by trial and error how to conciliate each other. Future generations always have to return to treaty talks and renew them as new circumstances arise.” Although IBAs are narrower in scope, such an iterative, conciliatory understanding of relationships can help to explain the inclusion of renegotiation provisions. Ex ante provisions providing for renegotiation represent a way for the parties to preserve the balance of benefits in the face of new circumstances at different stages of development. Consistent with the Court’s approach in Wastech, the developer’s choices would need to be assessed in light of the range of reasonable purposes for which the discretion was granted.

At a practical level, this means that the developer must consider Indigenous interests when making decisions on suggested amendments. An arbitrary rejection of proposed modifications in the face of changed circumstances would constitute a breach of the duty to exercise contractual discretion in good faith. Since IBAs are relational contracts developed with incomplete information about the long-term evolution of the project, it would be inconsistent with the express inclusion of renegotiation provisions for a party to refuse to consider ways to preserve the

220. Ibid, art 5.3. See also Mary River IIBA, supra note 83, at 22.7.
221. Ibid, art 22.4.
222. This context is therefore different from the circumstances of Churchill Falls, supra note 170. In that case, the contracting party sought to ground the recognition of an implied duty to renegotiate a long-term contract in the requirements of good faith. See ibid at para 105. This proposition was rejected by the Supreme Court as beyond even the broad approach to good faith accepted in the civil law. See ibid at para 105. In contrast, many IBAs expressly include renegotiation clauses, and therefore require courts merely to assess the good faith exercise of contractual discretion, as they would with any provision. See Wastech, supra note 172 at para 58 (confirming that “the duty to exercise contractual discretionary powers in good faith is well-established”).
224. Wastech, supra note 172 at para 76.
equilibrium of the agreement in the face of transformed circumstances. While
the process of renegotiation allows for a range of options to be discussed and
for an honest, back-and-forth exchange, a refusal to take amendments seriously
would fall outside the parties’ reasonable expectations. In extreme circumstances
where external changes have heavily distorted the efficacy of the IBA, it may be a
breach of good faith to steadfastly refuse reasonable terms. Put differently, when
the developer’s promises in the IBA ring hollow in light of subsequent events,
it would run counter to the purposes of the renegotiation provision for them to
ignore the Indigenous party’s concerns.

It merits emphasizing that, in this approach, adjudicators would not be
given license to impose their own ideas of fairness, which might raise concerns
about ad hoc decision-making. Rather, adjudicators would assess whether a
party’s exercise of its discretion was consistent with the parties’ shared, reasonable
expectations and the purposes for which the renegotiation provisions were
included within the IBA.

Taken together, the two types of clauses examined in this section lead to similar
conclusions about the role of good faith in supervising the exercise of contractual
discretion: The developer must consider the Indigenous party’s non-economic
interests when deciding how to use its contractual right, and its ultimate decision
can be sanctioned if it evidences a marked departure from the balance of interests
found within the IBA. This still leaves wide latitude for developers to exercise
their discretion, meaning that good faith is not a catch-all concept to remedy
deficiencies within the agreement. Nevertheless, the organizing principle of good
faith and its related doctrines represent a useful way of identifying what it means
for a developer to behave responsibly.

IV. CONCLUSION

IBAs occupy a unique position at the intersection of public and private law,
of empowerment and oppression, and of settler and Indigenous traditions.
Important questions remain concerning their effectiveness and their impact on
the long-term struggle for Indigenous self-determination. To complement these
discussions, this article has sought to demonstrate that the application of contract
law principles to existing IBAs also merits attention. Put simply, since IBAs are sui
generis contractual instruments that differ in fundamental ways from traditional
forms of contracting, adjudicators should adopt a sensitive approach, rather than

225. See e.g. Bhasin, supra note 122 at para 70; Wastech, supra note 172 at para 74.
226. See Wastech, supra note 172 at paras 74 (Kasirer J), 131 (Brown and Rowe JJ, concurring).
a narrow application of contract law principles that would undermine both the agreement and the underlying purpose of the rules themselves.

This article explained how IBAs exist in the shadow of constitutional dynamics—interacting with the Crown’s duty to consult, privatizing disputes that might otherwise occur within public law, and enacting a parallel form of governance to fill gaps in existing regulatory and financing frameworks. Even as they suffer from the coercive context in which they were formed, IBAs reflect a variety of cultural, social, and environmental objectives that challenge narrow conceptions of such agreements as purely financial instruments. Taken together, IBAs sit on a fragile foundation while seeking to contractually address issues that extend far beyond the traditional realm of contract law. A rigid approach to contract law risks presenting an incomplete view of IBAs, thereby devaluing Indigenous interests within the agreement. More tailored guidance can help both parties with organizing their affairs, and adjudicators with resolving disputes.

Based on this conclusion, the article examined specific contractual doctrines in order to assess how they could be applied to IBAs. First, it proposed a flexible, culturally sensitive approach to interpretation, guided by contractual principles and insights from the modern treaty context. Second, it considered how the normative foundations of good faith can take their colour from the context in which IBAs are concluded and performed, recognizing that the lack of veto power over the project means that the Indigenous party is acutely reliant on the developer’s good faith. At the negotiating stage, the imposition of the duty of good faith can serve to sanction sharp dealing and dishonesty. At the performance stage, a sensitive approach to the good faith exercise of contractual discretion can require the corporate developer to consider Indigenous interests before acting and, in certain circumstances, temper the uncompromising pursuit of economic gain when it would clearly depart from the balance of objectives at the heart of the IBA.

Ultimately, contract law cannot fully erase the structural disadvantages faced by Indigenous parties seeking to protect their lands and communities: It remains challenging to examine a complex relationship through the lens of private law, and the outcome of the dispute resolution process may be inadequate to restore the Indigenous party to its prior position. Nevertheless, this article sought to examine a promising area within a much larger critical discussion of the IBA regime. In so doing, it may serve as a foundation for further perspectives and contributions: Given the lack of public guidance on interpreting and enforcing IBAs, scholarly discussion can fill a critical gap by developing a contractual approach that protects Indigenous interests and expectations. The present article’s central analysis and substantive contributions seek to foster this emerging discussion.