ABORIGINAL LAW

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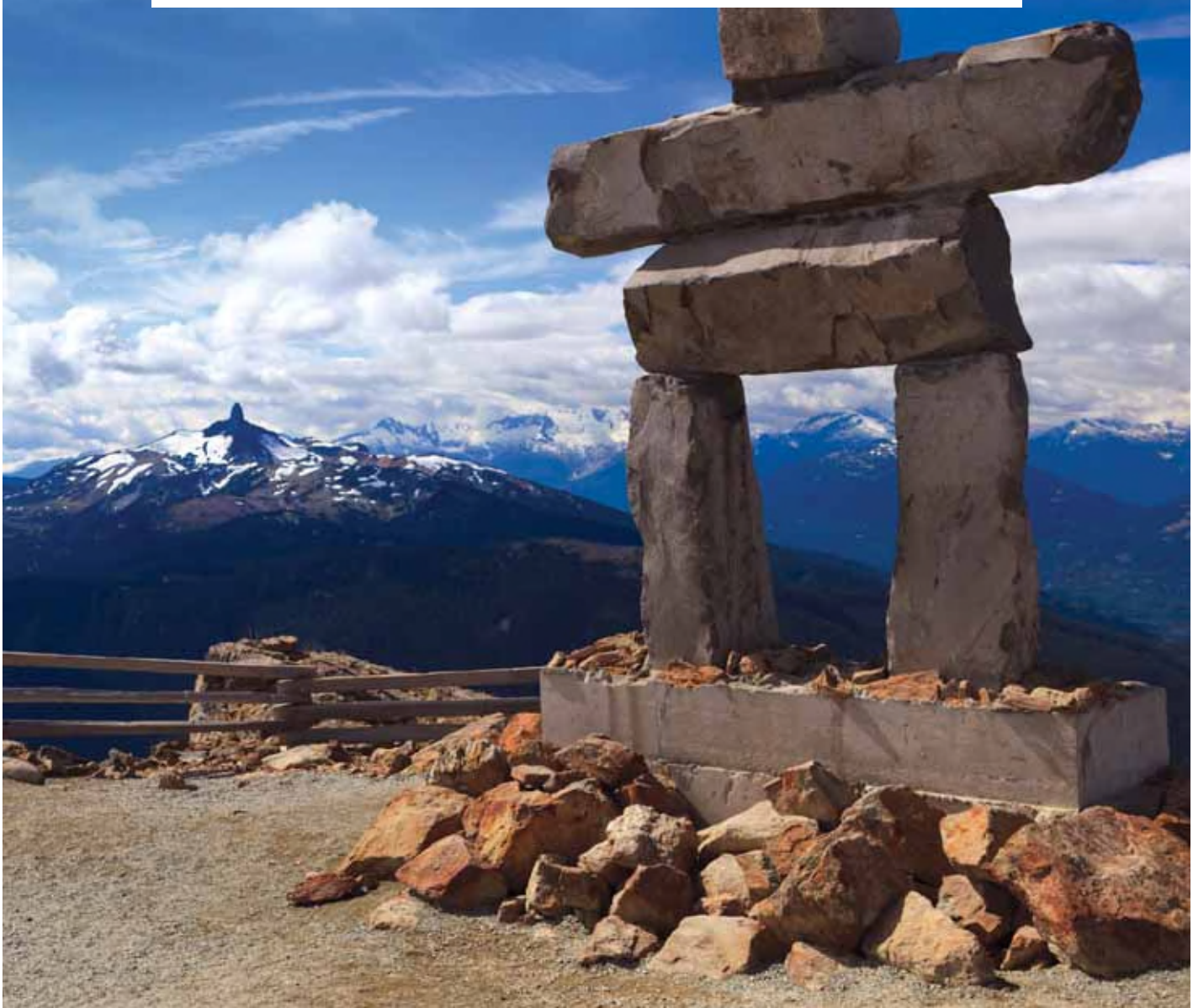

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Business transactions and projects in Canada can impact or involve Canada's Aboriginal communities, particularly in the context of resource or land development. While many businesses have successfully engaged and partnered with Aboriginal communities, this is a rapidly evolving area of law and practice and there are many issues that often need to be effectively navigated to ensure success. Where Aboriginal issues exist for any proposed transaction or project, it is important to consider the issues in the context of the current law and prudent business practices and to develop business strategies that are most likely to achieve the desired results.

Overview

Aboriginal rights and claims are frequently implicated by the acquisition and development of land and natural resources in Canada. This is of considerable interest to businesses involved in the energy, mining, forestry and transportation sectors, particularly for developments and activities on lands subject to claims of Aboriginal rights or title.

By way of background, there are three distinct Aboriginal Peoples in Canada – First Nations, Inuit, and Métis. Within these groups, there are more than 617 *Indian Act* bands (representing approximately 50 distinct First Nations), 53 Inuit communities in four distinct regions, and six provincial and territorial Métis organizations. There are significant cultural and historic differences between these groups and the nature and scope of their asserted or established rights vary considerably.

In 1982, the Aboriginal and treaty rights of First Nations, Métis and Inuit peoples in Canada became constitutionally protected through the enactment of section 35 of the *Constitution Act, 1982*. While this significantly increased the protection of Aboriginal and treaty rights in Canada, the Supreme Court of Canada has recognized that these rights are not absolute, and can be infringed by the Crown if certain requirements are met.

The law regarding Aboriginal rights and title is constantly evolving and business practices relating to Aboriginal communities often change to keep up with developments in the law, government policies and the expectations of these communities. In addition, Aboriginal groups are becoming increasingly active in the commercial marketplace as

equity participants and in public-private partnerships. It is important to understand both the stakeholders as well as the issues involved with the making of contracts and the taking of security where Aboriginal participants are involved.

Jurisdiction Over Aboriginal Peoples

Canada's federal Parliament has exclusive legislative jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. This includes First Nations, Inuit, and Métis peoples, although jurisdiction over the Métis was unclear until it was recently confirmed by the Supreme Court of Canada in April 2016. The federal government has enacted a range of legislation mostly for First Nations, including the *Indian Act*, the *First Nations Fiscal Management Act*, the *First Nations Land Management Act and the Indian Oil and Gas Act*.

While the federal government has exclusive jurisdiction over Canada's Aboriginal Peoples, provincial and territorial laws of general application still typically apply to First Nations, Metis and Inuit in each jurisdiction.

Aboriginal Rights and Interests

The Supreme Court of Canada has recognized that there is a duty to consult and potentially accommodate Aboriginal groups where the federal, provincial, and territorial governments are making a decision that could adversely affect asserted or established Aboriginal or treaty rights. This duty is triggered for the vast majority of Crown approvals for resource development.

Aboriginal rights are those rights that have been traditionally exercised by Aboriginal Peoples, including customs, traditions and activities integral to the distinctive culture of the Aboriginal group in question. Aboriginal rights can include rights that have been traditionally enjoyed by the members of an Aboriginal group, such as hunting, trapping, fishing and gathering. It can also include Aboriginal title, which is a sui generis right in land that is distinct from other proprietary interests, such as fee simple estates.

Aboriginal title confers a broad bundle of rights similar to fee simple, including the right to use, manage, and derive economic benefits of the land. However, there are three important limitations which ensure continuity of the Aboriginal group's relationship with the land: (i) the land must be collectively held; (ii) it cannot be alienated except to the

Crown; and (iii) it cannot be encumbered, developed or misused "in a way that would substantially deprive future generations of the benefits of the land."

To date, Aboriginal title has only been established in one case. In 2014, the Supreme Court of Canada found that the Tsilhqot'in Nation had established Aboriginal title over a tract of land in central British Columbia. The Court held that if Aboriginal title is proven, the consent of the Aboriginal group is required in order for the Crown or a proponent to proceed with development or use of the Aboriginal title lands. Absent such consent, the Crown would need to justify any proposed incursion onto the land or infringement of title by a compelling and substantial governmental objective that was consistent with the Crown's fiduciary duty to the Aboriginal group.

The majority of Aboriginal title assertions in Canada are in British Columbia and most of these assertions have some degree of overlap with the Aboriginal title assertions of other Aboriginal groups in the province. In addition, there are also unsettled Aboriginal title claims in the north, Alberta, Ontario, Québec and Atlantic Canada, as well as Métis claims in Manitoba. Some of these claims also include assertions of Aboriginal title to water beds or bodies of water, an issue that has not been judicially considered to date in Canada.

Although there are Aboriginal title assertions throughout Canada, Aboriginal title has been surrendered, modified, or is no longer asserted in many areas of the country pursuant to treaty, such as the claims of Aboriginal signatories to the 26 modern treaties and the 11 historic numbered treaties. These treaties and other historic treaties with land surrender provisions cover Northern Québec, much of Ontario, Manitoba, Saskatchewan, Alberta, portions of B.C., Nunavut, and large portions of the Yukon and Northwest Territories. Aboriginal title assertions are nonetheless relevant for certain historic treaties, including the numbered treaties, as some Aboriginal groups challenge the validity of the land surrender provisions, dispute the boundaries of the treaty, or argue that they are not treaty signatories.

Treaties

Many Aboriginal Peoples have rights set out in historic and modern treaties.

There are approximately 70 recognized historic treaties and 26 modern treaties in Canada. These treaties cover much of the country's land mass as discussed above but differ significantly in their length, terms, and original purpose. Historic treaties, which were entered into prior to 1975, are generally quite short and recognize rights, such as hunting, fishing, trapping, and trade for a moderate livelihood, among other things. Some of these treaties include land surrender provisions while others do not. Modern treaties are much more detailed agreements and confer a broader range of rights and benefits from harvesting rights to subsurface rights, self-government provisions, fee simple ownership of specific lands, and significant capital transfers.

Consultation and Accommodation

As noted above, the Crown has a duty to consult and potentially accommodate Aboriginal groups when it is making a decision or issuing an approval that may adversely affect asserted or established Aboriginal or treaty rights. The obligations imposed by the Crown's duty can often be significant, and in some cases a single decision of the Crown may require consultation with many different Aboriginal groups, some of which may have overlapping claims or interests.

The scope of what consultation and potential accommodation is required varies and is proportionate to the strength of the case supporting the existence of the Aboriginal or treaty right and the degree of the potential adverse effect of the Crown's decision on that asserted or establish right. Inadequate Crown consultation can lead to approvals or permits being delayed or called into question, community and investor relations' challenges or litigation for injunctions or damages, all of which can have serious impacts on project schedules and costs.

There is no stand-alone duty on the Crown or a project proponent to reach agreement with Aboriginal groups, but good faith consultation may give rise to a duty to accommodate. At law, accommodation can include mitigating, minimizing or avoiding adverse effects of actions or decisions on asserted or established Aboriginal or treaty rights. What amounts to appropriate Crown consultation and accommodation is a matter for legal analysis on a case-by-case basis.

Although the duty to consult is ultimately the responsibility of the Crown, the courts have stated that procedural aspects of this consultation may

be delegated to and carried out by project proponents and through regulatory processes. It is not uncommon for the Crown to pass on certain requirements associated with the duty to consult to project proponents who are seeking government approvals. In many cases, the proponent will have the greatest familiarity with the proposed project and will be best suited to engage with Aboriginal groups and to address any relevant concerns in a meaningful way.

Many Aboriginal groups have developed their own consultation policies and processes for engaging with proponents and the Crown, and many have capacity funding requirements. Proponents are frequently asked to fund third-party heritage and environmental assessments and studies to determine the extent of Aboriginal interests and the potential impact of proposed projects, and often a form of funding agreement is presented to a proponent.

Within the context of major resource projects, the Crown's duty to consult usually will be triggered at the formal commencement of the regulatory review process. However, many proponents choose to engage with Aboriginal groups from the earliest stages of project planning in order to build relationships with local communities. Early and effective consultation and engagement with Aboriginal groups has become one of the most critical factors affecting the viability and ultimate success of a project and therefore should be treated as an integral part of project planning and development. Experienced legal advice is required to guide the proponent through the consultation and approval process in order to ensure that all relevant Aboriginal groups are being consulted and that the Crown's duty is properly carried out and documented for evidentiary purposes.

Successful Agreements with Aboriginal Groups

There is currently no requirement at law for the Crown or proponents to enter into agreements with Aboriginal groups in order to fulfill the Crown's duty to consult or accommodate Aboriginal groups, and there is no requirement at law for accommodation to include economic compensation to Aboriginal groups. However, it is common for federal and provincial governments to promote agreements such as impact benefit agreements or participation agreements between project proponents and Aboriginal Peoples. In some cases, a province will also enter into an agreement where tax or other government revenue is shared

with interested Aboriginal groups. Reaching successful agreements can assist in addressing the concerns of Aboriginal groups, establish stable frameworks allowing development projects to move forward and provide an effective means of managing Aboriginal-related risks and establishing regulatory certainty for projects.

The scope and content of benefit and participation agreements vary widely among projects and Aboriginal groups. Understanding the specific interests and objectives of an Aboriginal group and having experience with the different types of agreements in use form a foundation towards the development of a successful relationship with Aboriginal groups and ultimate project approval. Agreements with Aboriginal groups can include a variety of benefits for the Aboriginal group, including employment opportunities, support for education and training initiatives, contracting and business opportunities, and capacity building, generally with corresponding assurances to the proponent that create certainty and facilitate the development of the project. In some cases, agreements will formalize engagement processes and include environmental monitoring and protection commitments.

Major projects increasingly provide for a range of economic benefits including equity participation, through a variety of financial models, for affected Aboriginal groups that are seeking to secure ownership interests and long-term revenues for their communities. Projects that involve Aboriginal equity participation often involve more sophisticated advice in order to ensure that the project is financeable and employs the most efficient tax structure for all parties.

Projects on Aboriginal Lands

Increasingly, projects and project assets are being located on lands held by Aboriginal groups themselves. There are different types of Aboriginal lands and political structures in Canada and a number of different regimes that may apply. Specific knowledge of the applicable regime is critical. Federal laws often do not adequately cover developments on Aboriginal lands and both federal and provincial regulators often have significant concerns regarding matters, such as the lack of applicable provincial environmental protection regimes, particularly on major projects. In some cases, these concerns are addressed contractually. In others, the federal *First Nations Commercial and Industrial Development Act* is used by Aboriginal groups, federal and provincial governments and project

proponents to voluntarily apply specified provincial laws to projects on Aboriginal lands where there otherwise would be a “regulatory gap” in the federal regime.

Conclusions

Projects in Canada that involve Aboriginal rights and interests require specialized legal knowledge and experience. The regulatory regimes and case law relating to Aboriginal rights and interests are constantly evolving and it is important to bring the most current information to any project where Aboriginal rights or interests may have an impact. Understanding the potential scope of the rights and interests and building successful relationships and agreements with Aboriginal groups from project inception through completion and implementation are key elements of any successful project.

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