ABORIGINAL LAW

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Business transactions and projects in Canada can impact or involve Canada's Indigenous communities and engage issues of Aboriginal law, which is the body of Canadian law relating to Canada's Indigenous Peoples. While many businesses have successfully engaged and partnered with Indigenous communities, this is a rapidly evolving area of law and practice and the effective navigation of Indigenous issues is critical to successful project development in Canada. Where Indigenous 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 particularly the case for energy, mining, forestry and transportation projects, which often have the potential to impact lands and waters subject to claims of Aboriginal or treaty rights.

By way of background, there are three distinct Aboriginal Peoples of Canada that are recognized in the *Constitution Act, 1982* — First Nations, Inuit, and Métis. Within these groups, there are 619 *Indian Act* bands (representing approximately 50 distinct First Nations), 53 Inuit communities in four distinct regions, and six representative provincial and national Métis organizations. There are significant cultural and historic differences between and among 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 s. 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 continues to evolve. Business practices relating to Indigenous communities also continue to change to keep up with developments in the law, government policies and the expectations of Indigenous communities, which can exceed what is required by law. In addition, Indigenous groups are becoming increasingly active in the

commercial marketplace as service providers/suppliers, equity participants and in public-private partnerships. It is important to understand both the communities, as well as the issues involved with the making of contracts and the taking of security where Indigenous 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 has been interpreted to include First Nations, Inuit, and Métis peoples. 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*, the *First Nations Commercial and Industrial Development Act* and the *Indian Oil and Gas Act*.

While the federal government has exclusive jurisdiction over Canada's Indigenous Peoples, provincial and territorial laws of general application still typically apply to First Nations, Métis 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 Indigenous 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 and is discussed further below, following a general overview of Aboriginal and treaty rights.

Aboriginal rights are rights that arise from practices, customs and traditions that were integral to the distinctive cultures of Indigenous communities pre-contact. Aboriginal rights can include but are limited to harvesting rights , 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 that ensure continuity of the Indigenous 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 Indigenous 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 Indigenous 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 Indigenous 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 and Saskatchewan. Some of these claims also include assertions of Aboriginal title to water beds or bodies of water. There have been two Aboriginal title claims to waterbeds that have been judicially considered to date and both claims were dismissed but are under appeal.

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 Indigenous 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 Indigenous 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 Indigenous 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 Indigenous groups when it is making a decision or issuing an approval that may adversely affect asserted or established Aboriginal or treaty rights. This is a constitutional duty and the obligations imposed by the Crown's duty can often be significant and require consultation with many different Indigenous 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 established right. Where the claim is weak and the impacts will be minor, the Crown may only be required to consult at the low end of the spectrum by giving notice, providing information and discussing issues raised in response. In other cases, where the claim is strong or there are established rights and the impacts will be significant, deep consultation may be required, which may entail the opportunity to make submissions and participate in the decision-making process, accommodation and the provision of written reasons.

Regardless of what level of consultation is required, it must be conducted in good faith and be meaningful. The duty to consult is not intended to simply provide a process to exchange information or an opportunity for Aboriginal groups to "blow off steam." Serious consideration needs to be given to concerns raised and the Crown must be prepared to make changes based on the input received. 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. Inadequate Crown consultation or accommodation 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.

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 that the duty can be discharged through regulatory processes provided the specific process is sufficient to satisfy what is required in the circumstances. 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 Indigenous groups and to address any relevant concerns in a meaningful way.

Many Indigenous 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 provide capacity funding to Indigenous groups, including funding third-party Indigenous knowledge and land-use studies to determine the extent of Indigenous interests and the potential impact of proposed projects. Capacity funding can be required to ensure consultation is meaningful, but whether funding is required will be fact-specific and consultation obligations may be fulfilled in the absence of funding.

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 Indigenous groups from the earliest stages of project planning in order to build relationships with local communities. Early and effective consultation and engagement with Indigenous 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 Indigenous groups are being consulted and that the Crown's duty is properly carried out and documented for evidentiary purposes.

Indigenous groups have been increasingly raising the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in project consultation and asserting that projects cannot proceed without their *Free, Prior, and Informed Consent* (FPIC). The federal and B.C. governments

have both passed framework legislation and released action plans to implement UNDRIP. This legislation does not give legal effect to UNDRIP but is intended to provide a framework to implement the Declaration over time. Both governments have stated that UNDRIP does not provide Indigenous groups a veto over resource development and appear to be interpreting consent as an objective rather than an absolute requirement in all circumstances.

Successful Agreements with Indigenous Groups

There is currently no requirement at law for the Crown or proponents to enter into agreements with Indigenous groups in order to fulfil the Crown's duty to consult or accommodate Indigenous groups, and there is no requirement at law for accommodation to include economic compensation to Indigenous 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, and certain governments are increasingly expecting agreements to be in place before issuing an approval. 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 Indigenous 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 Indigenous groups. Understanding the specific interests and objectives of an Indigenous group and having experience with the different types of agreements in use is important when working in this area. Agreements with Indigenous groups can include a variety of benefits for the Indigenous group, including employment opportunities, support for education and training initiatives, contracting and business opportunities, and in some cases financial benefits, such as an annual royalty payment or equity interest with corresponding assurances to the proponent that create certainty and facilitate the development of the project. In some cases, agreements will formalize future engagement processes for the life of a project 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 Indigenous groups that are seeking to secure ownership interests and long-term revenues for their communities. Projects that involve Indigenous 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 Indigenous Lands

Increasingly, projects and project assets are being located on lands held by Indigenous groups themselves. There are different types of Indigenous lands and political structures in Canada and a number of different regimes that may apply. Specific knowledge of the applicable regime is critical, particularly for developments on First Nations' reserve land. Federal laws often do not adequately cover developments on Indigenous 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 Indigenous groups, federal and provincial governments and project proponents to voluntarily apply specified provincial laws to projects on Indigenous 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 Indigenous groups from project inception through completion and implementation are key elements of any successful project.

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