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Indigenous Law

Introduction

Indigenous Peoples in Canada (First Nations, Inuit, and Métis) have Aboriginal rights (including treaty rights) that may include Aboriginal title over significant areas of land. These rights must be taken into account when an enterprise is developing or financing a natural resource, a mining, an energy, or a real estate project or any other project that requires government permits or approvals.

The government has a duty to consult and, if appropriate, accommodate Indigenous Peoples to avoid or mitigate any impacts a proposed activity may have on treaty or Aboriginal rights and title. The government may delegate some of these obligations to industry, and, in practice, this is often the case. As a result, in Canada, appropriate engagement with Indigenous Peoples is fundamental to successfully moving any major project or transaction forward and ensuring the continued viability of existing facilities and operations. Often, the

right engagement strategy (and its diligent implementation) can mean the difference between success and failure.

The landscape has shifted significantly over the past few years, with major developments in case law and, more recently, government policy.

Aboriginal and Treaty Rights of Indigenous Peoples

The Aboriginal and treaty rights of Indigenous Peoples in Canada are protected under Section 35 of the *Canadian Constitution Act, 1982* (Section 35). Section 35 protects remaining Aboriginal title to certain lands in Canada, Aboriginal rights to use lands for certain traditional purposes (such as hunting, fishing, or trapping), and rights conferred on Indigenous Peoples under historical and modern treaties (Section 35, “Rights”).

Duty of Consultation and Accommodation

In order to reconcile Section 35 Rights with the sovereignty of the Crown, the federal and provincial governments (“Crown”) have a constitutional duty to consult Indigenous Peoples if the Crown is contemplating conduct that may have an adverse effect on their Section 35 Rights.

Examples of Crown conduct that can trigger the duty to consult include decisions to grant surface tenures over public lands, the issuance of new permits or the modification of existing permits (such as environmental or impact assessment certificates), decisions approving the transfer of permits (e.g., in the course of an acquisition), and many others.

The threshold to trigger the Crown’s duty to consult is low – it arises when the Crown has knowledge (real or constructive) of the potential existence of Aboriginal rights or title and is contemplating conduct that may adversely affect such rights or title. The duty exists prior to the actual proof of rights or title and even with very minimal evidence of potential harm.

Once triggered, the content of the duty (i.e., what the Crown must do to fulfill it) varies from case to case. At the low end of the spectrum, only the notice and sharing of project-related information may be required. At the high end of the spectrum (where there is a strong case supporting the existence of the Aboriginal rights or title and the potential for an adverse effect is serious), the duty to consult may necessitate concrete measures that mitigate or compensate for the adverse impacts. These measures are referred to as accommodation and may include alterations to the project and/or revenue sharing on the part of the Crown.

Negotiation

The Crown may delegate procedural aspects of consultation to companies and other proponents, but there is no requirement to obtain consent on lands where Aboriginal title has not yet been established through a judicial declaration or a treaty. Recent changes are moving toward regulatory structures that give more weight to consent and consensus building, particularly federal and provincial environmental assessment schemes. Many companies seek to obtain consent with respect to projects and operations that affect lands subject to Aboriginal rights and title claims in advance or in parallel with regulatory processes. In some jurisdictions, primarily in northern Canada, proponents of major development projects are required to negotiate an impact benefit agreement with

potentially affected Indigenous Peoples under concluded land claims agreements or legislation governing resource development. Federal and provincial permitting authorities are moving toward giving increasing weight to consent (but stopping short of requiring it or close to it) and at least the requirement to seek to obtain consent where Aboriginal title might be affected.

Regardless of the Crown's approach, by consulting with Indigenous peoples and attempting to address as many of their concerns as possible, proponents have been able to avoid or limit potential opposition to projects and operations and the negative consequences that can result from a lack of communication and engagement with Indigenous Peoples, such as challenges to a government decision to issue a permit or licence based on inadequate consultation.

1. Recent Developments

a) United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) describes the rights of Indigenous Peoples around the world and offers guidance on co-operative relationships with Indigenous Peoples based on the principles of equality, partnership, good faith, and mutual respect.

An important aspect of UNDRIP is that of free, prior, and informed consent (FPIC), which, among other things, requires the government to consult and cooperate in good faith with the goal of obtaining the free, prior, and informed consent of Indigenous Peoples before adopting and implementing legislative or administrative measures that may affect them and

before approving any project affecting their lands, territories, or other resources. (In situations of extreme impacts, such as relocation or the storage or disposal of hazardous substances, actually obtaining FPIC may be required.)

The federal government has stated its full support of UNDRIP, and some provinces in Canada have done the same.

b) Government Response to UNDRIP

On December 15, 2015, after six years of hearings into Canada's residential school system, the *Truth and Reconciliation Commission of Canada* (TRC) released its final report, *Honouring the Truth, Reconciling for the Future*. The report concluded with 94 Calls to Action to guide reconciliation with First Nations, Inuit and Métis peoples. Many of those recommendations focused on government implementation of UNDRIP.

On June 21, 2021, the federal government brought into force Bill C-15 in response to these calls to implement UNDRIP as a framework for reconciliation in Canada. An Action Plan is being developed in consultation with Indigenous Peoples that will chart a path for the federal government to align existing and Future federal laws with UNDRIP. The Action Plan must be completed by June 2023 and must include the following measures:

- To address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination against Indigenous peoples, including youth, children, Elders, persons with disabilities, women, men and gender-diverse and Two-Spirit persons

- To promote mutual respect and understanding, as well as good relations, including through human rights education
- Related to the monitoring, oversight, follow up, recourse or remedy or other accountability with respect to the implementation of the UN Declaration
- For monitoring the implementation of the plan itself and for reviewing and amending the plan

Some provinces have also passed legislation to implement UNDRIP and work on action plans regarding how to meet the objectives of UNDRIP over time is ongoing.

Many corporations are also creating reconciliation policies to lay out their commitment and actions to further reconciliation with Canada's Indigenous Peoples.

c) Truth and Reconciliation Commission

In 2014, the *Truth and Reconciliation Commission of Canada* (TRC) recommended 94 calls to action in order to redress the legacy of residential schools and advance the process of Canadian reconciliation. These recommendations include requirements that industry use UNDRIP as a framework for reconciliation and seek FPIC and that the Crown adopt UNDRIP as a framework for reconciliation and adopt the process of seeking to obtain FPIC.

d) Expanded Roles for Indigenous Peoples in Environmental Assessments and Other Legislation

In August 2019, a new *Impact Assessment Act* came into force. An overarching theme throughout the new *Impact Assessment*

Act is a focus on Indigenous Peoples to ensure their rights, culture, and traditional knowledge are considered at the various stages of an impact assessment. This legislation broadens project reviews from assessments focused heavily on environmental effects to consideration of a wider range of effects, including more consultation with Indigenous Peoples throughout all stages of the impact assessment process. Related changes have been proposed to other legislation concerning the environment and project development. Some provinces have recently introduced legislation mirroring these federal changes.

On September 26, 2022, the Impact Assessment Agency of Canada released the "Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions". This framework is a guide to how federal officials consider and protect Indigenous Knowledge in project reviews and regulatory decisions under various acts including the Impact Assessment Act, the *Canadian Energy Regulator Act*, the *Fisheries Act* and the *Canadian Navigable Waters Act*.

2. Considerations for Doing Business in Canada

As a result of this evolving legal framework, Indigenous participation in transactions and projects is rapidly rising across all sectors of the Canadian economy. Proponents and operators are actively seeking agreements with Indigenous Peoples to secure their consent and support for new projects and existing facilities that could potentially affect Section 35 Rights.

At the same time, Indigenous Peoples are pursuing business alliances with the private sector to address infrastructure deficits within

their communities, generate wealth, and create economic opportunities for future generations. This is resulting in Indigenous Peoples taking more active roles in relation to development in their territories – from simply being consulted or employed on projects to being equity participants in operating businesses and industrial facilities. For equity participants, there has been an evolution from small equity stakes, or full ownership

of small projects, to sophisticated partnerships or other commercial arrangements. It is anticipated that this trend will continue to grow in the coming years.
