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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, energy, or 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 rights 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 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.

The inclusion of "free prior and informed consent" (FPIC) in the United Nations Declaration on the Rights of Indigenous Peoples (discussed more fully below) has created an expectation in many Indigenous communities that consent is a legal requirement. However, the requirement at law remains consultation (unless dealing with proven Aboriginal title). This gap between legal requirements and expectations is something for business to be aware of when operating in Canada.

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 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 (i) giving increasing weight to consent, though not mandating it, and (ii) at a minimum, 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.

UNDRIP & Legislative Adoption in Canada

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). Among other things, it requires governments 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 in redress the legacy of residential schools in Canada and guide reconciliation with First Nations, Inuit, and Métis peoples. Many of the recommendations focused on government implementation of UNDRIP. These recommendations include that the Crown and industry use UNDRIP as a framework for reconciliation and adopt the process of seeking to obtain FPIC.

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. The *United Nations Declaration on the Rights of Indigenous Peoples Act* (the UNDRIP Act) obliges the federal government to work in consultation and cooperation with Indigenous peoples to take all measures necessary to ensure existing and future federal laws are consistent with UNDRIP. To further this goal government, in consultation with Indigenous peoples, is to prepare and implement an Action Plan to achieve UNDRIP's objectives, and develop annual progress reports and submit them to Parliament.

- On June 21, 2023, following a two-year consultation and cooperation process with Indigenous peoples, the federal government released the Action Plan, comprising 181 measures that Canada has committed to take with Indigenous peoples over five years to advance implementation of the UNDRIP Act. The evergreen Action Plan is to be renewed and updated as needed, and must include 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 Action Plan itself and for reviewing and amending the plan

The third annual progress report on implementing the UNDRIP Act was tabled on June 18, 2024. As the first report to track implementation of the Action Plan, it highlights progress made on Action Plan measures including:

- Developing an Indigenous Justice Strategy to address systemic discrimination and the overrepresentation of Indigenous people in the criminal justice system
- Advancing water and wastewater service transfer to First Nations communities, including through the introduction of Bill C-61, *An Act respecting water, source water, drinking water, wastewater and related infrastructure on First Nation lands*

- Consulting with Indigenous partners and representative organizations on border-crossing challenges long faced by Indigenous peoples whose traditional territories are divided by colonial borders
- Revitalizing Indigenous languages by continuing to implement the *Indigenous Languages Act* (Shared Priorities Measure 92)
- Ensuring consideration of Aboriginal and Treaty rights in all federal laws

This report also identifies areas for improvement, including the need for better coordination across the federal government, respectful yet efficient timelines for collaborative work and developing performance measures, adequate funding, and clear accountability.

Some provinces and territories have passed legislation to implement UNDRIP. British Columbia was the first province to release an action plan in 2022 and publishes annual progress reports. The Northwest Territories passed its UNDRIP legislation (Bill 85) in 2023, and the development and implementation of an action plan, in consultation and cooperation with Indigenous peoples, 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) Treaty Interpretation and the Honour of the Crown

The "honour of the Crown" imposes upon federal and provincial governments a high standard of honourable dealing with Indigenous peoples. Although the honour of the Crown is not a cause of action, it is a guiding constitutional principle that can generate various duties. In *Ontario (Attorney General) v. Restoule*, the Supreme Court of Canada found that the honour of the Crown gave rise to a duty of diligent implementation of its promises under treaties and influenced a broader range of remedies available to further the goal of reconciliation.

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. Some provinces have introduced or proposed changes to their own legislation mirroring some of the federal changes.

The *Impact Assessment Act* was amended in June 2024, in response to the Supreme Court of Canada's finding (in Reference re Impact Assessment Act) that the Act's designated projects scheme was unconstitutional because it overstepped federal legislative jurisdiction. Further legislative amendments will be needed to bring the Impact Assessment Act within constitutional bounds. For example, amendments to the Physical Activities Regulations are expected, in particular to revisit the list of designated projects to ensure that the legal framework applicable to federal impact assessments is consistent with the Court's finding.

e) Federal Government Procurement Strategy for Indigenous Business

On August 6, 2021, the federal government committed to awarding a minimum of 5% of the total value of all federal contracts to Indigenous businesses by the end of fiscal year 2024-2025. To support this mandatory requirement, the government made changes to its longstanding Procurement Strategy for Indigenous Business (PSIB), which establishes rules to increase procurement opportunities for Indigenous businesses by setting aside federal contracts specifically for Indigenous businesses.

The PSIB is a mandatory policy for all federal government departments and agencies. It requires a contracting authority to determine if a procurement it is considering falls under the PSIB before soliciting bids for the contract. If the PSIB applies, the procurement must be set aside for Indigenous businesses in instances where the contract is in an area, community, or group in which Indigenous peoples make up more than half of the population, and the Indigenous population will be the primary recipient of the goods, services, or construction. In other circumstances, contracts may be voluntarily set aside for Indigenous businesses where certain conditions are met. Since the 5% target was announced, the government has made changes to the PSIB, including expanding scope of the mandatory set-asides and broadening the definition of "Indigenous business" required to meet the eligibility criteria.

Procurements involving set-asides under the PSIB are excluded from the competitive procurement requirements under Canada's domestic and international trade agreements. If there are any applicable modern treaty obligations (for example, consultations, accommodations, a right of first refusal for Indigenous businesses, or impact and benefit agreements), these obligations supersede, and must be considered before the application of the PSIB.

Amid increasing concern about the PSIB process – including inconsistent application (or lack of consideration) of the PSIB by contracting authorities and reports of abuses by non-Indigenous businesses falsely claiming Indigenous identity – it is anticipated that further reform of the PSIB may be undertaken.

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.