Cooperation Agreements and Benefits Agreements with First Nations

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I. Introduction

The development of projects and business opportunities, particularly in the natural resource industries, requires government decision making, from the issuance of resource tenures, through environmental assessment of proposed works and activities, and through licences, permits and authorizations. Before making decisions authorizing works and activities which may impact on Aboriginal rights and interests, governments must meet legal requirements for consultation and accommodation respecting those rights and interests. While the ultimate responsibility for consultation and accommodation rests with government, resource and development companies seeking positive government decisions to enable their projects and activities to proceed, can assist the process, and influence the outcome, by seeking to reach cooperation agreements and benefits agreements with the appropriate First Nations.

The legal requirements for consultation and accommodation will be dependent on a number of factors including the location of the proposed project and activities, the nature of the project and activities, the status of Aboriginal rights and interests (which can range from unresolved claims, historic treaties, and modern land claim agreements), and the potential impacts.

A number of both strategic and practical issues will arise in the process of negotiating and concluding cooperation agreements and benefits agreements as discussed below.

II. Three General Contextual Categories

As a general proposition, the context of Aboriginal rights and interests in Canada falls into the following three categories:

1. Aboriginal rights and interests covered by historic treaties;

2. Aboriginal rights and interests which are the subject of unresolved and outstanding claims; and

3. Aboriginal rights and interests which are covered by modern treaties and land claim agreements.

Attached as Schedule 1 to this paper is a map of Canada indicating the areas of the country which fall generally within these three categories.

The following is a very summary outline of treaties and land claim agreements to provide only a basic background for the negotiation of cooperation agreements and benefits agreements.

III. Historic Treaties

Prior to Confederation, in the colonial period, a number of treaties were signed in areas now included in southern Ontario, southern Quebec, New Brunswick, Prince Edward Island and Nova Scotia. These treaties generally establish peaceful relationships and recognition of the Crown, and confirm (implicitly and later expressly) the right to exercise traditional activities over the covered territory. After the Royal Proclamation of 1763, the treaties generally provided for confirmation of Crown land, creation of reserve lands, and continued rights to traditional activities such as hunting, fishing, and cultural activities on Crown land.

Post-Confederation, between 1871 and 1921, the government negotiated 11 treaties with the First Nations of Ontario, the Prairies, and the Northwest Territories. These treaties were undertaken by the Treaty Commissioner as part of a policy for the extension of settlement and resource development in the west and northwest. The treaty process stopped when it reached the Rocky Mountains.

The 11 treaties, which are generally known as the "Numbered Treaties" are relatively short forms of agreement (3 to 4 pages), under which it is recognized that title to the lands is vested with the Crown, and that certain specified lands were reserved to the First Nations. The Numbered Treaties generally confirm that First Nations people continue to have the right to pursue their usual vocations of hunting, trapping and fishing throughout the Crown lands covered by the Treaties, with the exception of any tracts of lands that may be required or taken up from time to time by government, for purposes such as settlement, mining, forestry, etc.

It was determined by the Supreme Court of Canada, in the *Mikisew Cree*[1] case, that before making decisions with respect to the allocation of Crown land within the areas covered by the Numbered Treaties, the government (whether federal or provincial) is required to consult with First Nations, and to consider reasonable and appropriate measures for accommodation of impacts on their rights.

IV. Areas Covered by Unresolved Claims for Aboriginal Title and Rights

There are significant portions of Canada which were not covered by the historic and Numbered Treaties referred to above. These include northern Quebec, Labrador and Newfoundland, the area of British Columbia west of the Rocky Mountains, the area of the Yukon Territory west of the Rocky Mountains, and the eastern Arctic (then part of the Northwest Territories but now known as Nunavut).

In British Columbia, west of the Rockies, several treaties were signed between 1850 and 1853 covering certain portions of Vancouver Island. Outside of those treaties, British Columbia remains an area of unresolved First Nations claims for Aboriginal title and interests, except in the few cases where modern treaties have been agreed to, as discussed below.

[1] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

In the *Haida*[2] decision (2004), the Supreme Court of Canada confirmed that the government has a legal obligation to consult with First Nations, and to consider reasonable and appropriate accommodation measures, before making decisions relating to works or activities that might adversely affect potential and unresolved claims of Aboriginal title or rights. The extent of the consultation and accommodation required (referred to as the scope and content of the consultation) is dependent on the circumstances in each case, with particular reference to the "strength" of the claims and the potential level of impact on the Aboriginal title and rights that are claimed.

In setting out the approach to consultation and accommodation, the Court confirmed that the First Nations also have a positive obligation to engage in consultation, and to outline their claims with clarity, confirmed that the potential for impact on First Nations rights must not be viewed in a vacuum but must be viewed in the broader context of the general public interest, confirmed that good faith is required on both sides, confirmed that the First Nations do not have a veto over government decisions, and confirmed that balance and compromise is necessary. With respect to the requirement for accommodation, the Court indicated that where the consequences of the proposed decision may adversely affect First Nations rights and interests in a significant way, reasonable accommodation may be required to balance competing societal interests with Aboriginal and treaty rights.

Arising out of the *Haida* decision in 2004, the federal government and provincial governments have undertaken a number of measures to meet these legal requirements, including the development of consultation policies, incorporating processes of consultation and accommodation into the decisions of government ministries, as well as the decisions of government agencies, boards, and commissions, and establishing requirements for project proponents to undertake and participate in processes of consultation and accommodation.

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[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

V. Modern Treaties and Land Claim Agreements

Many areas of Canada are now covered by modern treaties and land claim agreements. These include:

- northern Quebec – the James Bay and Northern Quebec Agreement of 1975;
- Yukon Territory – the Umbrella Final Agreement signed in 1993, followed by Final Agreements with 11 of the 14 Yukon First Nations;
- the Nunavut Settlement Agreement between the Inuit of the Nunavut and Canada, signed in 1993;
- treaties and land claim agreements in the Northwest Territories including the Western Arctic Inuvialuit Claims Agreement, the Gwich'in Land Claim Agreement, the Sahtu Dene and Métis Land Claim Agreement, and the Tlicho Land Claim Agreement; and
- in British Columbia, the Nisga'a Agreement (1998), the Tsawwassen First Nation Agreement (2007), and the Maa-nulth First Nation Agreement (2011) (with a number of other treaties in the process of negotiation and ratification).

These modern treaties and land claim agreements are clear in determining which lands are under Aboriginal title and which lands are Crown lands. First Nations continue to have rights to carry on traditional activities (hunting, fishing, trapping, gathering, etc.) on Crown lands. The modern treaties and land claim agreements are very specific in setting out the responsibilities of governments for consultation and accommodation, and also make extensive provisions for representation and participation of the First Nations in decisions (particularly land and resource use decisions, and water management decisions) which may have environmental or socio-economic impacts.

In the case of *Beckman (Government of Yukon) v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, the Supreme Court of Canada determined that, in the context of a modern treaty and land claim agreement, the principle of the honour of the Crown also required government to consult, even where it was not specifically required under the treaty and land claim. In that case, the decision involved the issuance of a grant of a 65 hectare parcel of Crown land to be used for agricultural purposes. The Court found that the standard of consultation was at the lower end of the spectrum, given the context of the treaty and land claim agreement, and found that the government had met the standard. In that case, the Court also confirmed that, ultimately, the government retains the responsibility for making decisions respecting Crown lands, after meeting the duty to consult, taking into account the balance of societal interests and the level of potential impact on Aboriginal rights and interests, and making reasonable decisions.

VI. The Nature of Aboriginal Rights and Interests

While Aboriginal rights and interests are extensive and complex, they can generally be categorized as follows:

1. Aboriginal title – in the *Delgamuukw* case[3] (1997), the Supreme Court of Canada confirmed that, in non-treaty areas, First Nations can maintain claims for Aboriginal title if the First Nation can establish that it occupied the lands in question, and that the occupation was exclusive, at the time of the assertion of Crown sovereignty (in British Columbia the date is taken as 1848);

2. Aboriginal rights – at common law and under both historic and modern treaties, First Nations people have Aboriginal rights to exercise traditional uses of unoccupied Crown land, including hunting, fishing, trapping, gathering, cultural activities, etc.

[3] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

It is notable that, while a number of court claims for Aboriginal title are pending, there has not yet been any decision which conclusively determines whether or not a claim has been established for Aboriginal title in any particular case. In areas of the country where claims have not been settled and resolved through treaties and land claim agreements, the question of the location and extent of any lands (outside of reserve lands) which fall under Aboriginal title is highly uncertain.

With respect to Aboriginal rights to the use of land for traditional activities such as hunting, fishing and gathering, these rights generally pertain to unoccupied Crown land, whether or not a treaty or land claim is in place. As indicated above, under the historic Numbered Treaties, the rights of First Nations to continue traditional activities on unoccupied Crown land was expressly confirmed. Modern treaty and land claim agreements also expressly confirm the right of the First Nations to use unoccupied Crown land for these activities.

VII. Government Decisions which Trigger Consultation

The following are examples of some of the major government decisions generally required to enable natural resource or land use projects to proceed:

1. Environmental assessments

Both the British Columbia *Environmental Assessment Act* ("BCEAA") and the *Canadian Environmental Assessment Act* ("CEAA") prohibit the construction and operation of projects which meet or exceed specified criteria for size and capacity, unless authorization is granted after detailed assessment of potential environmental and socio-economic impacts. These requirements apply particularly to projects such as electrical generating stations (fossil fuel-fired and hydroelectric), transmission lines, dams and reservoirs, oil and gas production and processing facilities, oil and gas pipelines, mines, pulp and paper mills, industrial plants, marine terminals, railways, airports, and hazardous waste disposal facilities. If the construction or modification of these types of facilities meets the specified criteria of size and capacity, they must first undergo

an environmental assessment, and receive a positive determination from either or both of the provincial and federal governments before they can proceed to regulatory permitting authorizing construction and operation.

2. Permits, licences and authorizations

These can include:

(a) *Mines Act* permits;

(b) oil and gas facilities permits issued by the Oil and Gas Commission;

(c) certificates issued by the National Energy Board;

(d) certificates issued by the B.C. Utilities Commission;

(e) water licences for the use of water under the *Water Act*,

(f) waste discharge permits (air, effluent and solid waste) under the *Environmental Management Act*;

(g) leases or other dispositions of Crown land;

(h) permits for clearing Crown land and for the establishment of roads or rights-of-way; and

(i) authorizations under the *Fisheries Act* for impacts on fish habitat.

Where projects require environmental assessment, the regulatory authorities (under CEAA the Canadian Environmental Assessment Agency, and under BCEAA the B.C. Environmental Assessment Office) will issue Guidelines or Application Information Requirements to the project proponent which outline the baseline information and the environmental and socio-economic

assessment which the proponent is required to undertake. The Guidelines or Application Information Requirements will also include a requirement that the proponent give specific consideration to the potential for impacts on Aboriginal rights, undertake a process of consultation with First Nations whose rights or interests may be adversely impacted, and consider alternatives or mitigation measures for managing or addressing impacts on Aboriginal rights and interests. The proponent will also be required to summarize any benefits (employment, business opportunities, etc.) which may accrue to First Nations.

Similarly (and particularly where no environmental assessment process is required), regulators and Crown agents considering applications for licences, permits and authorizations will also require the proponent (applicant), to provide an assessment of the potential impacts on Aboriginal rights and interests, and to undertake processes of consultation.

Regulators and Crown agents will, in addition to the consultation measures undertaken by the project proponent/applicant, also undertake direct consultation with the First Nations whose rights or interests may be affected.

In making decisions on matters which may impact First Nations rights and interests, the ultimate government decision makers are generally required to consider:

(a) whether the process of consultation has been both meaningful and extensive enough to meet the legal standards, taking into account the strength and nature of the Aboriginal rights and interests which may be affected, and the extent to which those rights or interests may be affected;

(b) whether reasonable measures have been taken to minimize or mitigate the potential effects, and to accommodate the Aboriginal rights and interests;

(c) whether or not the project or activities will result in significant environmental or socio-economic impacts after taking mitigation measures into account; and

(d) ultimately, whether the project, taking into account the potential impacts, the level of consultation, and the level of accommodation, is in the public interest, and should be authorized to proceed.

VIII. Cooperation Agreements

A cooperation agreement (sometimes called a memorandum of understanding or an interim agreement) is generally focused on establishing relations, procedures and funding, as a framework for the consultation process and for undertaking other activities in the pre-development phase. The objectives of a project proponent in a cooperation agreement include:

- the establishment of good relations and communications with the First Nation;
- processes for consultation with the First Nation (note that there are generally three steps in consultation):
    1. providing the First Nation with information on the proposed project;
    2. giving the First Nation a reasonable opportunity to consider the project and to communicate its concerns respecting potential impacts; and
    3. giving full and fair consideration to the First Nation's concerns, including the adoption of measures to mitigate impacts and to provide benefits;
- obtaining baseline information required to undertake an assessment of the potential impacts of the project (in particular, information on traditional and current use of the project area by the First Nation and its members);
- establishing timelines for consultation and for obtaining information; and

- establishing a framework for moving forward towards potential support for the project and participation in benefits (training, employment, business opportunities, etc.).

The objectives of the First Nation in a cooperation agreement may include:

- ensuring full consultation (and even consent) on all phases of the project (exploration, scientific and technical studies, project design, project alternatives, etc.);
- ensuring that the First Nation's concerns are fully considered at all stages of project assessment;
- ensuring that adequate funding is available to cover the First Nation's expenses in the process, which could include traditional use studies (TUSs), socio-economic assessments, costs of reviewing project documentation and technical studies relating to the environmental assessment process, costs of the First Nation's consultants on technical issues, legal costs, meeting costs, and costs of the First Nation's internal consultation processes;
- ensuring benefits to the First Nation and its members at the pre-development phase of the project through training, employment and business opportunities;
- establishing expectations for a potential benefits agreement should it be determined that the project will proceed (the development phase);
- ensuring protection of environmental, cultural and traditional values; and
- keeping information and negotiations confidential.

The following are some key points to consider in negotiating a cooperation agreement:

- an agreement is clearly beneficial – but it is not a pre-condition to government decision making. The company can proceed with consultation processes and in making commitments to offer benefits without necessarily being able to reach agreement;

- be very careful with the issue of "consent". Consultation is about providing information, seeking input, listening to concerns and responding. Proponents who commit that they will not proceed with a project, or any particular phase of a project (exploration, information gathering, technical and engineering work) without "agreement" or "consent" compromise and impair their own rights to seek development of resource tenures; and

- be very careful respecting the limits of confidentiality provisions. The proponent is required under government processes to report on its consultation efforts. Proponents who commit to keep all discussions or information confidential compromise their ability to establish that they have met consultation requirements, to report on First Nation concerns, and to confirm how they have responded to mitigate those concerns.

IX. Benefits Agreements

While cooperation agreements generally focus on the process of consultation leading to government decisions (while also conferring benefits related to pre-development activities), benefits agreements generally proceed on the basis that a project will be supported and approved, and focus on measures and commitments to ensure that the First Nations participate in the positive benefits of the project.

Standard terms of benefits agreements generally focus on the following issues:

- education and training;
- employment opportunities; and
- contracting opportunities.

Benefits agreements may also include provisions for:

- financial participation;
- reporting on monitoring of environmental and socio-economic impacts;
- support for communities; and
- implementation and management.

The following are some issues which will require careful consideration under each of these headings:

Education and Training

In relation to opportunities for education and training, First Nations will seek to ensure that these programs are linked to employment opportunities, and are offered early enough to enable members of the First Nations to take advantage of employment opportunities as they arise during the construction and operation phases of the project. Education and training programs will likely require coordination with the First Nations and with other education and training providers, will require funding commitments, and will require the establishment of communications protocols. Careful consideration should be given to the requirements that the obligations of education and training will likely apply to contractors and subcontractors working on the project. Consideration should be given to the definition of contractors and subcontractors (generally not

extending to professional advisors and consultants). See also the discussion below respecting employment commitments as they pertain to contractors and subcontractors.

Employment

A number of issues will arise in connection with commitments made in relation to employment opportunities:

- are the commitments based on best efforts, or on specific objectives relating to the number of employees or their percentage of the workforce?
- the employment commitment will likely apply to contractors and subcontractors;
- while giving full consideration to all applicants for employment, does the company (and its contractors and subcontractors) retain the ability to make decisions respecting the qualifications of individual applicants for a particular employment position?
- give careful consideration to human rights legislation applicable in the province or territory to confirm the ability to undertake preferential hiring. For example, section 42 of the B.C. *Human Rights Code* confirms the ability to adopt employment equity programs with the objective of improving conditions of disadvantaged individuals or groups. Under section 42(3), an application can be made to obtain approval of the program or activity. Approval reduces risk of potential challenges to the program.

Contracting Opportunities

It is essential to review any proposed agreement respecting contracting opportunities with the company's engineering and procurement departments in advance. While benefits agreements will likely include provisions to support First Nations contracting and subcontracting opportunities during construction, operation and decommissioning, it is important to balance

these provisions with the need to ensure that there is competitive bidding on these contracting opportunities. The proponent must also retain the ability to make the final determination as to whether a prospective contractor or subcontractor has the ability to deliver products and/or services in a timely, efficient and competitive manner, and that the proponent has the final decision on all contract awards.

Contracting opportunities provisions of a benefits agreement should give consideration to:

- the types of contracts to which the provisions apply (in general, not applicable to professional and technical consultants, engineering, etc.);
- opportunities for breaking down large contracts into smaller components to improve the capacity of First Nations to bid on carry out the contracts;
- similarly encouraging contractors to break down large subcontracts into smaller components;
- determining the definition of what qualifies a First Nations business entitled to priority (generally based on the degree of ownership and the location of the business);
- is the proponent commitment to use best efforts to support First Nations participation and contracting activities, or does the benefits agreement establish specific targets (such as the percentage of procurement of goods and services from First Nations businesses)?
- addressing the contract award procedures including negotiated contracts, requests for proposals, and invitational tenders;
- criteria for evaluating bids and the extent to which First Nations content will be given credit; and

- application of the bidding processes and bidding criteria to contractors and subcontractors.

Financial Participation

Increasingly, governments, including the Government of British Columbia, are considering the extent to which resource revenues (royalties, stumpage, etc.) will be shared with First Nations. Governments have made agreements in specific cases, to pass on a portion of royalties to First Nations, particularly in the oil and gas sector and in the mining sector. To the extent that agreements are reached between government and First Nations on resource revenue sharing, this may affect negotiations relating to additional financial benefits under a benefits agreement.

The issue of financial compensation is often raised and can range from fixed cash payments, through variable cash payments (such as royalties, net smelter returns, or percentages of revenues, cash flow or net profit). As well, in some cases, the question of equity participation will be raised in the context of benefits agreements.

Very careful consideration must be given to these discussions respecting financial benefits, including their effect on the company's bottom line, their timing (when do they commence and when do they terminate), and their effect on the economic viability of the project. With respect to timing, consideration should be given to whether certain forms of financial benefit commence on milestone dates such as decisions to proceed with the construction of the project, the date on which production starts, the extent to which they are suspended if production is temporarily suspended, and the date when financial benefits end (for example, on a fixed date when production ceases, or when, in the case of a mining project or upstream oil and gas development, production ceases and reclamation has been completed).

Reporting on Monitoring of Environmental and Socio-Economic Impacts

Natural resource projects are subject to extensive regulatory and reporting requirements under permits, licences and authorizations. It is important to give careful consideration to the potential costs and administrative burden of any additional obligations under a benefits agreement which duplicate or extend the basic legislative and regulatory burden.

Support for Communities

Benefits agreements may provide for financial support to First Nations communities to undertake projects such as infrastructure, community facilities, etc. Careful consideration should be given by both the company and the First Nation to ensuring that any of these contributions do not have the unintended effect of reducing any government contributions which would otherwise be available.

Implementation and Management

Benefits agreements will generally establish a committee or some other process for communication between the parties, for regular review of the objectives and results of the benefits commitments, and to ensure that the agreement is being implemented. Careful consideration should be given to how the costs of the implementation and management will be shared.

Some further issues that should be considered in benefits agreements are the following.

Agreement to Support the Project

It is important to remember that if and when the permits, licences or authorizations for a project are challenged in court, the target of the challenge is generally the government ministers or agencies that have issued decisions. For example, there are many cases in which ministerial or government agency decisions authorizing projects have been challenged in the courts on the

basis that the government has not fulfilled its consultation duties or has not complied with the provisions of a treaty or land claim agreement. The important point is that it is generally the government decision makers whose actions have been challenged. However, the challenges have direct consequences to the project proponent through the creation of uncertainty and delay, and for the potential that the licences, permits or authorizations for the project may be set aside by the courts.

Consideration should be given to provisions under which the First Nation agrees to support the project in obtaining any ongoing licences, permits and authorizations, and/or agrees not to initiate any judicial or administrative procedures to challenge the project or its underlying licences, permits and authorizations. In some cases, benefits agreements have provided only that the First Nation will not take the company to court. The assurances must be broad enough to include any processes (whether brought against the company or a government ministry or agency) which would delay or stop the project.

Transferability

It is very important that a benefits agreement include clear assurances with respect to any assignment or change in control of the company. An agreement which is not clear on these issues can significantly impair the ability of the company to sell or transfer a project or to undertake corporate restructuring or financing.

Applicability to Further Project Phases

It is very important to consider provisions in a benefits agreement respecting its application (or non-application) to potential additional phases of the project. Careful consideration should be given to whether the company wishes the benefits to extend to any additional phases or expansions of the project, or whether the company wishes to re-open negotiations as and when additional phases or expansions are developed. There are risks and benefits to either approach which must be carefully weighed. Some benefits agreements include provisions specifying that

the agreement applies to any and all additional phases or expansions, and other benefits agreements indicate that, while the general principles may apply, some or all of the provisions may be subject to re-negotiation in the event that the project moves to a further phase or expansion.

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