Aligning Resource Development with the Interests of Aboriginal Peoples in Canada

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Canada's economic future is dependent upon energy and natural resource development and therefore inextricably linked to the rights, interests and influence of Canada's Aboriginal peoples. Despite considerable advancement in the domestic law of consultation and accommodation, there is growing unrest and dissatisfaction among Aboriginal communities with the current approach to development on their traditional lands. The impact of this unrest and dissatisfaction on resource developers is readily apparent and evidenced by the increased legal, regulatory, financial and reputational risks associated with permitting delays, operational disruptions, protests and negative media attention.

Significant progress in the international human rights arena is lending support to indigenous aspirations and putting further pressure on resource developers to move beyond domestic legal requirements to obtaining the informed consent of Aboriginal communities prior to development proceeding on their traditional lands. Increasingly, innovative resource developers are able to align their interests with those of the affected Aboriginal communities through the use of thoughtful and creative commercial relationships, and are able to move forward with their proposed development within timely and predictable timeframes.

WHY THE CURRENT APPROACH DOESN'T WORK

In Canada, the Aboriginal and Treaty rights of Aboriginal peoples are constitutionally protected. The Supreme Court of Canada decision in *Haida* provides that the Crown is under a good faith duty to consult with, and possibly accommodate, these rights when it is contemplating action that may adversely affect those rights. The duty often arises in the context of authorizing energy development on traditional lands as proponents seek land tenure and environmental approvals. The possibility of the Crown not adequately fulfilling its duty to consult represents a significant source of legal, regulatory and financial risk for resource developers as permits and approvals are subject to delay and potential invalidation, and the expense and possible reputational damage associated with legal challenges.

While the law of consultation and accommodation provides for the right to be meaningfully consulted on energy development, it does not include a requirement to obtain the informed consent of Aboriginal communities to the proposed activity on their traditional lands except for in limited circumstances. On surrendered historical Treaty lands, for example, where a First Nation may have exchanged Aboriginal title for Treaty rights to hunt and fish on unoccupied Crown land within its traditional territory, the First Nation does not have the power to stop development. Rather, to the extent its Treaty rights are potentially impacted, the First Nation may have the right to be meaningfully consulted and possibly accommodated.[1] Even in the case of serious impact to the rights of the Aboriginal community, the right to be consulted does not amount to a right to informed consent or a "veto" as the duty to consult does not require the Crown to reach an agreement. While Treaty rights need to be respected, the Crown can generally continue to take up and manage the lands and resource in question to balance broader societal interests.

The notable exception to an affected community holding a right to consent is where the Aboriginal group holds some form of "title" to the lands (*e.g.*, statutorily administered First Nation reserve lands, Alberta Métis settlement lands, fee simple settlement lands and Aboriginal title lands). In *Tsilhqot'in*,[2] for example, the Supreme Court of Canada held that informed consent is required by government or third parties seeking to use Aboriginal title lands; and that the government can only justify overriding the affected Aboriginal community's wishes where consent is not provided in favour of a demonstrated, broader public good.

Accordingly, while the existing constitutional framework affords some degree of protection for Aboriginal interests in Canada, that protection is limited, and in most areas of Canada where resource development is occurring, does not readily align with the aspirations and expectations of the impacted Aboriginal communities. Aboriginal communities consistently expect to participate in and benefit from energy and natural

resource development on their traditional lands, or at least to be provided with a share in the revenues generated. Aboriginal communities are also seeking the right to co-manage their traditional lands and better protection of their rights from the cumulative effects of resource development.

To date, resource developers have generally managed these legal and regulatory risks through the conduct of good consultation practices and by entering into impact benefit agreements with potentially affected Aboriginal communities. Impact benefit agreements typically contain provisions on how the parties will work together and avoid or mitigate the identified impacts. Where the impacts are substantial, these agreements include various benefits to the affected Aboriginal community including education, capacity building, community investment funding, training and employment provisions, business opportunities and in some cases, revenue sharing or participation rights. In exchange, the energy developer is granted some legal certainty with respect to its project; often in the form of the withdrawal of a regulatory intervention or a covenant not to oppose operations or commence future legal challenges. However, despite good consultation practices and the willingness to enter into these agreements, energy developments today regularly experience significant legal and regulatory challenges.

While many political and practical initiatives between Canadian and Aboriginal governments are taking place in an attempt to resolve the apparent disconnect in expectations between resource developers and Aboriginal communities, the legal and regulatory frameworks have not yet evolved to where they satisfy Aboriginal aspirations. Until they do, it appears that resource developers in Canada will continue to face significant risk.

INFORMED CONSENT: THE INTERSECTION OF RESOURCE DEVELOPMENT AND HUMAN RIGHTS

Canada's Aboriginal peoples are also part of a rapidly growing global population of indigenous peoples. The international human rights community developed the *United Nations Declaration of the Rights of Indigenous People* (UNDRIP), which affirms their view that indigenous peoples require recognition of their collective rights as a people in order for them to fully enjoy their individual human rights. Through UNDRIP, the United Nations does not seek to create new or special rights for indigenous peoples, but rather explains it as elaborating existing human rights standards and articulating them as they apply to the particular situation of indigenous peoples as culturally distinct and self-determining, and having regard for their unique historical challenges.

A key element of UNDRIP is the principle of free, prior and informed consent (FPIC), which, *inter alia*, recognizes an inherent right of indigenous peoples to benefit from development on their traditional lands. In particular, Article 32(2) of UNDRIP provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

There is considerable disagreement in the international legal community as to the legal and practical effect of UNDRIP, with many viewing it as an aspirational document only, with no legal binding effect unless it has been incorporated into domestic law. Other experts, including James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples (UNSRRIP), argue that it has already become part of customary international law and accepted as law in general practice.

UNDRIP was initially opposed at the United Nations by only four member states: namely Canada, Australia, New Zealand and the United States, each having large, non-indigenous immigrant majorities and small remnant indigenous populations. All four opposing countries have since moved to endorse UNDRIP in some way, with Canada formally issuing a reluctant statement of support in 2010, while confirming that it was neither reflective of customary international law, nor did it effect any change to Canadian laws:

> In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration ... These concerns are well known and remain. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. **We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.**[3]

While Canada's qualified endorsement of UNDRIP falls short of adopting it wholly into domestic law, it does not follow that UNDRIP is not having a tangible impact in Canada. To the contrary, UNDRIP is leading a groundswell of support for seeking the FPIC of Aboriginal communities impacted by resource development.

Aboriginal leaders have consistently called for adoption of UNDRIP by Canadian Governments, a sentiment that has most recently been reflected in the recommendations of the Truth and Reconciliation Commission of Canada. Federal Bill C-641, defeated on May 6, 2015, called for "the Government of Canada to take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples". At the provincial level, the recently elected Alberta New Democratic Party has implemented a review of policies, programs and legislation that may require changes based on the principles of UNDRIP.[4]

More important, from a practical perspective for resource developers, is the realization that UNDRIP has had a discernable impact on the expectations of Aboriginal communities in Canada. The principles articulated in UNDRIP reflect the worldview of Canada's Aboriginal peoples and drive their expectations for a fundamental respect for their traditional lands and meaningful involvement in resource development and environmental stewardship. The failure of an energy developer to align with the Aboriginal communities in which it operates translates into increased project risk (uncertainty over regulatory and environmental approval, legal challenges based on inadequate consultation, etc.) and real business costs (increased financing costs, lost productivity, discounted valuations, indirect costs relating to conflict management, etc.).

USING COMMERCIAL ALIGNMENT TO OBTAIN FPIC

The 2014 report of the UNSRRIP entitled "The Situation of Indigenous Peoples in Canada," while largely negative in its conclusions regarding the social and economic well-being of Canada's Aboriginals, referenced several positive initiatives at the provincial level in the area of resource extraction that encouraged indigenous participation in economic development activities and benefits:

> "... **In Alberta, industry groups point to a number of joint ventures with First Nations in the energy sector, such as Kainai Energy oil and gas development company of the Blood Tribe and Tribal North Energy Services of Whitefish Lake First Nation.** In British Columbia and other parts of the country, governments encourage impact benefit and resource-sharing agreements between resource companies and First Nations. British Columbia also has revenue-sharing arrangements for mining royalties, stumpage fees, and oil and gas revenues ..."

"Kainai Energy" is a reference to a co-partnered "tribal energy company," created by Native American Resource Partners (NARP) with the Blood Tribe of southern Alberta, that has positioned the Blood Tribe to more fully realize the value and opportunity associated with oil and gas development on and adjacent to their reserve. Benefits to the First Nation include the ability to access capital to finance participation rights negotiated with industry partners, the ability to influence the pace and intensity of on-reserve resource development, and the ability to expand and develop resources adjacent to the reserve. Developing its mineral estate in a sustainable manner through its equity participation in Kainai Energy is key for the Blood Tribe in creating the financial sovereignty and stability that it requires in order to provide long-term social and economic benefits for its membership.

"Tribal North Energy Services" is a reference to a First Nations "tribal service company" focused on providing fluid transfer and heating services for oilfield hydraulic fracturing operations in the Treaty 6 and Treaty 8 areas of northern Alberta. The company is structured as a limited partnership and provides for equity participation by multiple First Nation partners, and employment preferences and skills training for First Nation members, allowing benefits from on-reserve and traditional territory resource activities to accrue directly to impacted First Nations.

Both Kainai and Tribal North are partnerships with NARP, a private investment firm specializing in structuring, financing, and implementing natural resource projects with Aboriginal communities, to source financial capital and provide technical capacity through the initial start-up and incubation phase. NARP identifies and incubates business development opportunities with the goal of assisting Aboriginal communities in attaining financial sovereignty through equity participation. Using its staff of technical, financial, and legal experts, NARP evaluates resource and service opportunities and then structures transactions that benefit all stakeholders, including the negotiated returns to its capital providers.

Kainai Energy and Tribal North can serve as useful examples for resource developers seeking to obtain the FPIC of affected Aboriginal communities by structuring commercial relationships that align the long-term interests of the energy developer with those of the affected Aboriginal communities.

COMMERCIAL RELATIONSHIPS WITH ABORIGINAL COMMUNITIES

While recognizing that each Canadian Aboriginal community has a unique history shaping its particular cultural identity, there are a number of general characteristics and attributes that can be recognized, understood and respected by resource developers in the course of seeking to implement successful commercial relationships in the context of obtaining their FPIC to development on traditional lands. Foremost is the observation that Canada's Aboriginal communities are indigenous, communal societies with distinct cultures, traditions, languages, needs and desires, capacities, challenges, and economic opportunities, and that they enjoy varying degrees of sovereignty, fiscal responsibility, and institutional maturity. As the first peoples of Canada, they played a fundamental role in the formation of our nation and, as a consequence, enjoy a unique legal status and relationship with the governments of Canada that must be considered and appreciated in order to understand who they are as peoples and how they have come to view energy development on their traditional lands.

Resource developers accustomed to process-oriented consultation and accommodation engagement with Aboriginal communities must recognize that different considerations will apply in the context of a commercial negotiation. While some Aboriginal governments enjoy the full powers of self-government, many others are statutorily regulated and must conduct themselves within the confines and limits of those statutory constraints. While most Aboriginal governments have the legal capacity to contract on behalf of their membership, material business decisions must be passed by a majority of Council at a duly convened meeting evidenced by a band council resolution. Significant decisions, either because of a legal requirement or the desire of community leadership to garner widespread support, may need to be ratified through a community referendum. Each community will also have a different level of capacity, business acumen and sophistication based on its experiences to date, the character, quality, and integrity of its advisors, and the structure of its government and bureaucracy.

Aboriginal governments also engage in and do business differently than corporations. They are most obviously governments, and in many respects when seeking illustrative parallels most closely resemble sparsely populated, large land base municipalities with a culturally homogenous constituency and restrictive enabling legislation in the *Indian Act*. In this respect, resource developers must identify and navigate political complexities, statutory constraints, divergent agendas, family loyalties, community pressure points, and powerful individuals, as it would in contracting with any municipality. Each factor plays a significant role in how a proposed commercial relationship is perceived and understood by the community, and like any transaction early and thorough counterparty due diligence is important and pays dividends in terms of a successful, long-term relationship. Aboriginal governments are also obviously Aboriginal and as an indigenous culture are primarily relationship-based, as distinguished from the corporate, "task based" culture that most North American and global resource developers exhibit. It follows that establishing trust early in the process, and moving forward in an open, collaborative, and respectful manner are critical components

of building a successful commercial relationship. Finally, each Aboriginal community, and many of the individual members within each community, may also have differing levels of trust respecting commercial proposals, and in particular those in respect of energy development, reflecting their past collective and individual experience.

Entering into long-term, successful commercial relationships with affected Aboriginal communities is largely an exercise in understanding the needs of that community, investing the time to adequately inform and where necessary educate that community and build consensus, and ultimately develop a level of trust that allows the energy developer to connect with the community as a whole. In order to build this requisite community consensus and support needed to pursue energy development with Aboriginal communities, it is important to understand their governance and leadership models. As a government, notionally akin to a municipal government, they are an elected body burdened with all the same issues as other local governments: a vocal electorate demanding responses and solutions to pressing collective community needs, including health, education, housing, drinking water, social support, and infrastructure. A key distinction, however, is that Aboriginal governments are largely without the usual tax base for a revenue source, being almost entirely funded through moneys provided by the federal government. Most Aboriginal governments struggle to access meaningful capital for infrastructure and internally generated business development opportunities, largely as a consequence of their inability to pledge assets as security, or their unwillingness to risk assets for investment. Those Aboriginal communities who are more sophisticated, or who have experienced more commercial or economic success, often are able to separate the political elements from the business administration functions, and have incorporated economic development arms in order to maintain political independence and promote commercial integrity. For the majority of Aboriginal communities across Canada, however, sitting Chief and Council, together with their third party advisors, *de facto* fulfil the business development function concurrent with their executive function. As a consequence of past bad faith transactions with industry and internal transparency issues, there can be significant and vocal distrust, both among Chief and Council and the community at large, for any and all commercial proposals and a demonstrated reluctance to commit to a project or partner without demonstrable consensus building efforts. This lack of trust and community-wide consensus building may necessitate repetitive community presentations in order to communicate who the proponent is, the nature of the project being proposed, and how the affected Aboriginal community can be expected to benefit from the energy development. The manner in which the nature and structure of a proposed commercial relationship, particularly the more complex ones, is presented to Chief and Council and the community becomes as important as the technical merits and profitability of the energy development itself.

In our experience, Aboriginal communities, and in particular the tribal elders that influence traditional decision making, are not opposed to energy development on their traditional lands, only to energy development in respect of which they do not equitably participate, or that is irresponsible in pace, scope or implementation. Traditional Aboriginal governance models encourage leaders of today to base their decisions on whether they would benefit their children several generations into the future, including embracing energy development provided it is conducted in a sustainable manner that respects traditional lands and with demonstrable benefit being returned to the community. In practical terms, a commercial relationship will be honoured and enforced by the elders and the broader community provided they are convinced that the spirit of the commercial arrangement aligns with the community's long-term interests.

ABORIGINAL COMMUNITY EQUITY PARTICIPATION

Notwithstanding the lack of a Canadian domestic law requirement to obtain FPIC, a number of affected Aboriginal communities have found innovative ways to participate in and take advantage of energy development opportunities on their traditional lands. These communities are involved in employment, procurement, training, community infrastructure development, revenue sharing, co-management, joint ventures, and other forms of economic participation. Commercial relationships providing affected Aboriginal communities with meaningful economic participation in energy developments on their traditional lands utilize a combination of three general categories of benefit: (i) a share of the passive resource revenues generated by the energy development either as a royalty share of the resource developers' commercial interest, or as a share of the Crown tenure bonus payment, resource production royalties and periodic rental payments; (ii) contractual preferences for training and employment opportunities for community members, and procurement opportunities for community and member-owned businesses; and (iii) a direct equity participation or active working interest in the energy development itself.

As an Aboriginal government, creating fiscal certainty without putting the current or future assets of the community at risk is often a priority for the leadership of the affected Aboriginal community. This risk-free fiscal certainty can be achieved through passive resource revenues and therefore it is often one of the first requests made by an affected Aboriginal community when an energy developer initiates its consultation process. Aboriginal governments are also often under political pressure to secure contractual preferences for employment and business opportunities, as these translate into immediate benefits for individual members and member-owned businesses.

While elements of these two categories of revenue may invariably need to be included in packaging the commercial interest, in our view, neither represent true FPIC but rather an opportunistic acquiescence on the part of the affected Aboriginal community to a resource development that will inevitably proceed. It is important to make a clear distinction between commercial arrangements that provide these passive resource revenues and contractual preferences to the affected Aboriginal community carved out of the energy developer's commercial interest, and commercial arrangements that provide an active equity participation interest in the energy development itself. The former provides very little in the way of capacity building for the Aboriginal community, does not invite input by the community into the nature, extent and pace of energy development, does not deliver any great understanding or insight into the energy development itself, and in our view, does not fully meet the needs of alignment and FPIC.

Providing an active equity participation interest to affected Aboriginal communities is a key element in obtaining informed consent and in reaching the degree of alignment necessary for the permitting of energy developments to proceed on predictable timelines, and for the requisite social licence from

those communities for operations to be conducted over the long-term without disruption. Equity participation provides affected Aboriginal communities with a voice in decision-making, aligns their interests with those of the energy developer, increases self-reliance by providing a line of sight to meaningful wealth creation and financial sovereignty, and ensures that both parties share in the costs, benefits, and risks of energy development activities on traditional lands. The potentially meaningful wealth creation associated with equity participation provides the affected Aboriginal community with an avenue for financial sovereignty as these own-source revenues are outside of federal government control and are available for discretionary use at the community level to improve housing, provide social services, and stimulate the community's local economy.

THE PATH FORWARD

This article has attempted to illustrate how resource development in Canada is at risk until it can successfully align with the interests of affected Aboriginal communities. In our experience, Aboriginal communities are not necessarily opposed to resource development; however, it will only be those resource developments that seek the informed consent of affected Aboriginal communities that will be able to proceed within timely and predictable timeframes. Commercial arrangements that allow for the meaningful participation of these Aboriginal communities provide the opportunity for innovative resource developers to align their interests.

1. To "accommodate" generally means to "adapt, harmonize or reconcile".
2. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in*].
3. *Backgrounder: Canada's Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples*, (November 12, 2010), online: Aboriginal Affairs and Northern Canada, https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.
4. Letter dated July 7, 2015, from Rachel Notley, Premier of Alberta to provincial Cabinet Ministers. http://Aboriginal.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf

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