Navigating a Changing Landscape: Challenges and Practical Approaches for Project Proponents and Indigenous Communities in the Context of the Review and Assessment of Major Projects

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I. INTRODUCTION, OBJECTIVES AND OUTLINE

Canadian law in relation to Indigenous peoples is often described as relatively new and devolving. Yet, ironically, this "new" law relates to what is perhaps the oldest issue in the country — an issue that predates the existence of the country itself — namely the fundamental issue of the relationship of Indigenous and non-Indigenous peoples.[1]

Canadian courts have been called on repeatedly in recent years to address fundamental and profound questions regarding the existence and content of Aboriginal rights and title; treaty rights and obligations; fiduciary obligations; the Crown's duty to consult and, if necessary, accommodate; and the honour of the Crown. Much has been written (both in this current collection and elsewhere) regarding this rapidly evolving legal landscape. The task of these courts and commentators is important work that needs to continue.

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[1] As the Supreme Court of Canada observed: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, at para. 1, [2005] 3 S.C.R. 388 (S.C.C.).

The objectives of this article are more modest. They are:

- to identify challenges that arise for both proponents and Indigenous communities in the context of the review and assessment of major industrial projects;[2] and
- to outline a practical approach to addressing those challenges that is consistent with — but not dependent on — the still evolving and uncertain case law.

In brief, challenges arise in trying to interpret and apply evolving legal standards to situations on the ground in real time. This presents challenges for all parties concerned — Indigenous communities, project proponents and Crown decision-makers. The Crown obviously plays a key role in the legal doctrine and discussion; however, the practical challenges of legal uncertainty are arguably more often visited upon project proponents and Indigenous communities. Accordingly, the following discussion will focus primarily on these latter two groups.

This article outlines a practical and effective approach for addressing project-related issues between project proponents and Indigenous communities that can be conceptually thought of as a "two-track" approach: Track 1 is consultation; and Track 2 is negotiation towards a mutually-acceptable impact-benefit agreement. Both of these tracks can and should be pursued in parallel, as each track reinforces the other. Used in combination, the two-track approach maximizes the odds of a successful outcome for both project proponent and Indigenous communities.

The discussion below proceeds in the following parts:

- Part 1 expands on the challenges arising from the evolving case law with a particular focus on the Crown's duty to consult and, if necessary, accommodate;
- Part 2 provides a brief introduction to the two-track approach, including how the two tracks interact and reinforce each other;
- Part 3 provides a more detailed discussion of the consultation process (Track 1) and the role of a project proponent;
- Part 4 provides a more detailed discussion of the negotiation process (Track 2) and gives a "walking tour" of the content of a typical impact-benefit agreement between an Indigenous group and a project proponent;

[2] This would include, for example, proposed mines, oil and gas facilities, pipelines, power plants, transmission lines, port or rail infrastructure and similar undertakings.

- Part 5 discusses a practical challenge regarding confidential information that can arise when parties are engaging in the two-track process.
- Part 6 provides concluding remarks and a discussion of a potential limitations of the parallel process described.

II. PART 1 — THE CHALLENGE

The key challenges — for both project proponents and Indigenous communities — arise from trying to identify and apply legal standards that remain, in some respects, unclear. Over the course of the assessment and review of a major project, which may go on for several years, these legal standards may also continue to evolve.

For example, the law in respect of Aboriginal title has been a slow and ongoing development. The existence of Aboriginal title (as a concept) was debated before the Supreme Court of Canada as early as the 1973 *Calder v. British Columbia (Attorney General)*[3] case and confirmed by the Court in 1997 in the *Delgamuukw v. British Columbia*[4] decision. The seminal decision in *Delgamuukw* addressed the content of Aboriginal title, how it is protected by section 35 of the *Constitution Act, 1982*[5] and the requirements necessary to prove it. However, it was not until 2014, in the *Tsilhqot'in Nation v. British Columbia*[6] decision, that the first actual declaration of Aboriginal title was issued.[7] While some aspects of Aboriginal title are clearer as a result of these important decisions, significant unanswered questions remain.[8]

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3 [1973] S.C.J. No. 56, [1973] S.C.R. 313 (S.C.C.).

4 [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.).

5 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

6 [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) [hereinafter "*Tsilhqot'in*"].

7 For further discussion of the law (and its uncertainties) in respect of Aboriginal title, see: Keith B. Bergner & Michelle S. Jones, *Mapping the Territory: Aboriginal Title and the decision in Tsilhqot'in Nation v. British Columbia* (2015: Rocky Mountain Mineral Law Foundation), Proceedings of the 61st Annual Rocky Mountain Mineral Law Institute, Chapter 14B.

8 For example, one significant unanswered question is how Aboriginal title might interact or be reconciled with fee simple title. There are numerous cases currently proceeding in the lower courts that engage the issue of the interrelation of Aboriginal title and fee simple title, but this litigation remains at an early stage. Some recent decisions have indicated that such fundamental litigation can proceed without a requirement for formal notice to fee simple title holders. See for example: *Cowichan Tribes v. Canada (Attorney General)*, [2017] B.C.J. No. 1761, 2017 BCSC 1575 (B.C.S.C.) and *The Council of the Haida Nation v. British Columbia*, [2017] B.C.J. No. 1874, 2017 BCSC 1665 (B.C.S.C.).

1. The Crown's Duty to Consult

The law in relation to the Crown's duty to consult and, if necessary, accommodate Indigenous people has presented particularly acute challenges for both project proponents and Indigenous communities. The incremental approach of the courts in this area has been deliberate. In *Haida Nation v. British Columbia (Minister of Forests)*,[9] the Supreme Court of Canada stated:

> This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.[10]

This work of "filling in the details" of duty to consult has been underway ever since — including occasional decisions from the Supreme Court of Canada.

The broad outlines of the law are now in place — and are familiar:[11]

- The Crown (*i.e.*, the federal and/or provincial government) has a legal duty to consult that "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[12] This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[13]

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[9] [2004] S.C.J. No. 70, 2004 SCC 73 (S.C.C.) [hereinafter "*Haida*"].

[10] *Id.*, at para. 11.

[11] For further discussion of the law (and its uncertainties) in respect of the Crown's duty to consult, see: Chris W. Sanderson, Q.C., Keith B. Bergner & Michelle S. Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty" (2012) 49:4 Alta. Law Rev.; and Keith B. Bergner, "The Crown's Duty to Consult and the Role of the Energy Regulator" (2014) Energy Regulation Quarterly, Vol. 2.

[12] *Haida*, *supra*, note 9, at para. 35.

[13] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, at para. 31, [2010] 2 S.C.R. 650 (S.C.C.).

- This duty to consult can also be triggered where the Crown contemplates conduct that might adversely affect treaty rights — including both historic[14] and modern[15] treaties.
- The content of the duty to consult and accommodate varies with the circumstances,[16] and falls along a "spectrum". At one end of the spectrum (where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor), the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice. At the other end of the spectrum (where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance), "deep consultation, aimed at finding a satisfactory interim solution, may be required".[17]
- The effect of good faith consultation may be to reveal a "duty to accommodate". Where a strong *prima facie* exists for the claim, and the consequences of government's proposed decision may affect it in a significant way, addressing the Aboriginal concerns may require "taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim".[18]
- The right to be consulted about proposed activities on Crown land does not provide Aboriginal groups with a "veto".[19] There is no duty to agree.
- Third parties (such as private oil and gas, mining or forestry companies) do not have a legal duty to consult. However, the Crown may delegate "procedural aspects" of consultation to industry proponents seeking a particular development.[20]

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[14] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69 (S.C.C.) [hereinafter "*Mikisew*"]. The *Mikisew* case considered the operation of the duty to consult in the context of a historic "numbered" treaty (Treaty 8 signed in 1899).

[15] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, 2010 SCC 53 (S.C.C.) [hereinafter "*Little Salmon*"]. The *Little Salmon* case considered the operation of the duty to consult in the context of a modern land claim agreement (the Little Salmon/Carmacks Final Agreement signed in 1997).

[16] *Haida*, *supra*, note 9, at para. 39.

[17] *Id.*, at paras. 43-45.

[18] *Id.*, at para. 47.

[19] *Id.*, at para. 48.

[20] *Id.*, at para. 53.

2. Easy to Say; Tough to Apply

While the broad parameters of the Crown's duty to consult have been articulated, they remain notoriously difficult to apply to specific factual situations. In a consultation case, it will fall to the court to determine the content of the duty to consult and whether it has been fulfilled. However, looking at the same set of facts, it is not uncommon for different judges to come to different conclusions. While this is not an uncommon phenomena in common law courts, the ongoing work of "filling in the details" of the duty to consult, makes this an area of the law more prone than others to divergent views.

The following example highlights the nature of these challenges. In 2004, the Yukon government approved the grant of 65 hectares of surrendered land to a Yukon resident named Larry Paulsen. The plot bordered on the settlement lands[21] of the Little Salmon/Carmacks First Nation, and formed part of the First Nation's traditional territory, to which its members have a treaty right of access for hunting and fishing for subsistence. The courts were asked to determine whether the duty to consult arose,[22] and, if so, the content of the duty and whether it had been fulfilled.

The lower courts were deeply divided on the content of the duty to consult and whether it had been fulfilled:

- The Chambers Judge concluded that "deep consultation" was required[23] and that the duty to consult had *not* been fulfilled.[24]
- The Court of Appeal came to a starkly different conclusion. It found that the duty was "at the lower end" of the spectrum and *had* been fulfilled.[25]

At the Supreme Court of Canada there was a further divergence of opinion:

- A majority (seven of nine Justices) agreed that the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum[26] and the requirements of the duty to consult were met.[27]

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[21] The treaty at issue was the Little Salmon/Carmacks First Nation Final Agreement, which was finalized in 1996 and ratified by members of the First Nation in 1997.

[22] All levels of court found that the duty to consult arose, although, as discussed below, the Supreme Court of Canada was divided on the basis for the duty.

[23] *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, [2007] Y.J. No. 24, at para. 109, 2007 YKSC 28 (Y.K.S.C.).

[24] *Id.*, at para. 122.

[25] *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, [2008] Y.J. No. 55, at para. 117, 2008 YKCA 13 (Y.K.C.A.).

[26] *Little Salmon/Carmacks First Nation*, *supra*, note 15, at paras. 57, 74.

[27] *Id.*, at para. 79.

- A minority (two of nine Justices) agreed with the result but disagreed on the source of the duty to consult. They found that "the source of that right is not the common law framework" but instead the terms of the Final Agreement, in particular its transitional provisions, established the applicable framework.[28]

By the time the legal principles and their application to the facts were clarified, many years had passed. The majority decision references "the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago)".[29]

The starkly differing conclusions in this case in respect of a fairly minor application highlights the challenges a project proponent and/or Indigenous community might have in responding to the demands of a more significant project proposal or application. There are many more "hapless" project proponents and Indigenous communities who are equally challenged in trying to apply evolving legal principles to real world situations.

There is no clear, objective test that can be applied, in advance, to determine the adequacy of a particular consultation process. No one rings a bell when the consultation process has reached a legally sufficient point. Proponents and communities are both left to struggle with and sometimes debate questions of what the law requires in a practical sense and how much is enough. The courts can provide only retrospective answers to these questions.

The remainder of this article is dedicated to outlining a practical approach — for both project proponents and Indigenous communities — given the residual uncertainty in the law.

III. PART 2 — AN INTRODUCTION TO THE TWO-TRACK APPROACH — FINDING A WAY THROUGH

A practical and effective approach for addressing project-related issues between project proponents and Indigenous communities can be conceptually thought of as a "two-track" approach.

- *Consultation* – Using the best guidance currently available, the parties implement and engage in a robust and thorough consultation program that is well planned, diligently executed and well-documented.

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[28] *Id*., at para. 204.
[29] *Id*., at para. 80.

- *Negotiations* – Using an interest-based approach, a project proponent and one or more Indigenous communities undertake negotiations towards a mutually-acceptable impact-benefit agreement.

For a project proponent, employing the two-track approach outlined above creates two possible routes to successful project implementation and operation. In the absence of a negotiated agreement, the consultation record may still provide the basis for Crown decision-makers in making a determination on authorizations required for the project. If the negotiations are successful — resulting in the support of the Indigenous community — the consultation process will likely never be scrutinized.

For an Indigenous community, employing the two-track approach outlined above can maximize the opportunities to (i) understand the proposed project and seek to avoid or materially mitigate potential adverse impacts to their Aboriginal rights and title through design changes to the project; and (ii) maximize the potential for benefits in an agreement with the proponent.

1. The Interrelation between Consultation and Negotiations

Consultation and negotiations are best undertaken in parallel — not in isolation — as the two processes reinforce each other; the more extensive and thorough the consultation process, the greater the likelihood of reaching an agreement. Through a robust consultation process, the proponent and the Indigenous group often build a better relationship and understanding of each other's interests, which often facilitates the negotiation of mutually acceptable agreements.

- From the perspective of a project proponent, if there is only a negotiation, then there is no consultation record to fall back on if the negotiations are not successful. In short, a project proponent may find themselves in a position where, as a practical reality, they *need* an agreement (even though there is no legal requirement for an agreement). Conversely, if there is only a consultation process, that consultation and project approval process might be made unnecessarily long, complicated, expensive and risky — all things that might be avoided with a mutually-acceptable agreement.
- From the perspective of an Indigenous community, the consultation process enables the leadership and the community to understand the scope and extent of the proposed project, and explore the viability of alternatives that might avoid or mitigate potential impacts on the community. In addition, a refusal to engage in the consultation process may ultimately work against

> the Indigenous community in a regulatory or Crown decision-making process. The consultation process can also inform and assist an Indigenous community in seeking to maximize the potential for benefits in a negotiated agreement.

IV. PART 3 — THE CONSULTATION PROCESS (TRACK 1) BETWEEN PROPONENTS AND INDIGENOUS GROUPS

1. The Role of the Project Proponent

As discussed above, third parties such as mining, energy and/or forestry companies do *not* have a legal duty to consult. However, the Crown "may delegate procedural aspects of consultation to industry proponents seeking a particular development".[30] In practice, this has frequently meant that a significant share of the consultation obligation falls to project proponents. (As a practical matter, very few companies are content to leave the fate of their projects entirely in the hands of the government.)

While the scope and extent of what constitutes "procedural aspects" of consultation is still the subject of legal debate, certain regulatory agencies have attempted to provide further direction. For example, the British Columbia Environmental Assessment Office (EAO) offers the following guidance:

> Generally, the "procedural aspects" refer to the direct engagement component of consultation that involves sharing and discussing information. More specifically, it includes:
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> - Providing information about the proposed project to First Nations early in planning process;
> - Obtaining and discussing information about specific Aboriginal Interests that may be impacted with First Nations;
> - Considering modifications to plans to avoid or mitigate impacts to Aboriginal Interests; and
> - Documenting engagement, specific Aboriginal Interests that may be impacted and any modifications to address concerns and providing this record to EAO.[31]

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[30] *Haida*, *supra*, note 9, at para. 53.

[31] Environmental Assessment Office, *Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process* (December 2013), online: <http://www2.gov.

In addition, pursuant to various regulatory directives, a project proponent is frequently required to initiate (and provide evidence of) a consultation program. For example, the National Energy Board's Filing Manual indicates that the Board expects an applicant to have a company-wide Consultation Program that "establishes a systematic, comprehensive and proactive approach for the development and implementation of project-specific consultation activities".[32] The Manual further provides:

> When designing project-specific consultation activities, applicants should consider that the Board expects consultation activities will, at a minimum:
>
> - be initiated as soon as possible in the planning and design phase of a project;
> - provide clear, relevant and timely information to potentially affected persons or groups;
> - be accessible to and inclusive of all potentially affected persons or groups;
> - be responsive to the needs, inputs and concerns of potentially affected persons or groups, and demonstrate how this informed the proposed design and operation of the Project; and
> - continue throughout the regulatory process, as well as the construction and operation phases of a project.

When consultation includes Aboriginal groups, applicants should consider establishing a consultation protocol in collaboration with these groups that takes into consideration their needs and cultural elements.[33]

Other environmental and/or regulatory review processes detail similar requirements for a proponent. In short, the necessary elements for a successful proponent-led consultation program include providing information about the project, providing a sufficient opportunity for an Indigenous group to raise concerns or questions regarding the project, giving those concerns full, fair and serious consideration, and where appropriate, responding to those concerns in a manner to avoid, mitigate or otherwise accommodate for potential adverse impacts of the project.

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bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/proponents_guide_fn_consultation_environmental_assessment_process_dec2013.pdf> at 4.

[32] National Energy Board, *Filing Manual* (Latest Update: 13 July 2017), ISSN 1718-472X ("Filing Manual"), section 3.4 (Consultation).

[33] *Id.*, section 3.4.2 (Designing Project-Specific Consultation Activities).

2. Capacity Funding

A common (although not universal) practice is for proponents to provide capacity funding to Indigenous communities to participate in a consultation process. Properly structured, such an arrangement can be advantageous to both parties:

- From a proponent's perspective, providing capacity can facilitate the implementation of a consultation program and build the strength of the consultation record. Traditional use studies can provide valuable information about past or current land use that can be incorporated into the assessment of the potential impacts of a proposed project.
- From the perspective of an Indigenous community, capacity funding may enable the community to acquire the external support and deploy internal resources to more fully participate in a lengthy consultation process. Capacity funding agreements can assist an Indigenous community to participate in a regulatory process in an effective and timely way.

Capacity funding provided by a proponent is often in addition to capacity funding amounts provided by regulatory agencies. For example, the Canadian Environmental Assessment Agency administers a Participant Funding Program, which supports, *inter alia*, Aboriginal groups interested in participating in federal environmental assessments.

When a proponent provides capacity funding, there is typically (but not always) a negotiated agreement put in place between the project proponent and Indigenous group. The negotiation of this early-stage and relatively short-term agreement often sets the stage for the negotiation of the more substantial and long-term impact benefit agreement discussed below in Part 4.

3. Traditional Use Studies

Many Indigenous groups will seek funding from a proponent to undertake traditional use or similar studies. Again, if properly structured, such an arrangement can be advantageous to both parties:

- From a proponent's perspective, there can be value in obtaining direct input from an Indigenous group — especially where the scope of the study is focused specifically on the project area. The information is less useful to the proponent when the scope of the study is broader (*e.g.*, addressing the traditional territory as a whole) and the information is more generalized. However, a study that fails to identify any specific interests or impacts in the

project area (notwithstanding the opportunity presented by the sturdy) can also assist a proponent in the regulatory process.

- From the perspective of an Indigenous community, traditional use studies may provide an opportunity to identify with greater precision interests and impacts arising from a project. Such studies may provide opportunities to document valuable oral history and in some cases strengthen connection between elders and youth. In addition, the information compiled through the course of such studies may also be useful in processes that go beyond the specific project under consideration. For example, the information may be useful in other consultation process, negotiations with the government, treaty negotiations and other similar forums.

Funding and the terms of reference for such studies may be addressed as part of an overall capacity funding agreement, or (less often) may be subject of a stand-alone agreement.

4. The Consultation Record

A thorough and adequate consultation program needs to be supported and documented by a thorough and adequate record of consultation. Both parties have an interest in the accuracy and completeness of this record.

- From the perspective of the project proponent, the record of consultation can be presented to a government decision-maker as part of the consideration of the proponent's application for requisite licences, permits and other authorizations. The proponent's consultation record, along with the Crown's own consultation efforts, can be used in a determination by the Crown as to whether the overall consultation process has been adequate.

- From the perspective of an Indigenous community, records of correspondence and consultation documents can demonstrate the concerns raised by the Indigenous group. If such concerns remain unanswered or unresolved, the consultation record can assist the Indigenous group in bringing such concerns before the relevant Crown decision-makers.

The common practice is to record communications in a chronological Consultation Log. In addition, key issues and concerns (along with the proponent's response) can be recorded in tracking tables. Underlying and supporting these summary documents is the raw material of the original letters, meeting minutes, emails and other communications. The credibility and usefulness of these documents is greatly enhanced if copies or drafts of the documents have been shared with the other participants — who are given an opportunity to comment or correct

inaccuracies. Thus assembled, the consultation record can assist in demonstrating both the *process* of consultation, as well as assisting in identifying the *substantive* issues and concerns arising.

5. The Risks of a Refusal to Participate in a Proponent's Consultation Program

Some might suggest that any proponent-led consultation process (and the resulting consultation record) will be self-interested and only serve the interests of the project proponent. They would argue that it is not in the interest of an Indigenous group to actively engage in a consultation process and that all efforts should be focused on negotiation of an agreement. The proponent's consultation process, they argue, will be "used against" the Indigenous community to seek approval of the project in the absence of the consent of the Indigenous community (which is usually evidenced by way of an agreement).

However, such an approach limits important opportunities and may create unnecessary risks for the Indigenous community. The consultation process provides the best opportunity for an Indigenous group to become informed and raise concerns about the proposed project. By delaying or deferring engagement in the consultation process, the community foregoes the opportunity to understand the project and explore any flexibility in the project's design or implementation. Early on in the life of a project, there may be significant flexibility in the design of a project. However, as the project is developed and more detailed design work is undertaken, it becomes increasingly difficult and expensive for significant changes to be undertaken. In addition, the consultation process can also foster relationship-building opportunities, which facilitate negotiations towards an agreement.

More fundamentally, a refusal to participate in a consultation process can work against the interests of the Indigenous group. The law is clear that consultation is a two-way exchange. In an oft-quoted passage, the British Columbia Supreme Court stated: "[C]onsultation is a two-way street. A reciprocal duty exists on the part of the First Nation to participate and consult in good faith and not to frustrate the process by refusing to meet or participate or by imposing unreasonable conditions."[34] When pursued in

[34] *Saulteau First Nations v. British Columbia (Oil and Gas Commission)*, [2004] B.C.J. No. 128, at para. 144, 2004 BCSC 92 (B.C.S.C.), affd [2004] B.C.J. No. 1182, 2004 BCCA 286

good faith, the consultation process offers both the Indigenous group and the project proponent an opportunity for better mutual understanding and, potentially, a better project.

V. PART 4 — THE NEGOTIATION PROCESS (TRACK 2) BETWEEN PROPONENTS AND INDIGENOUS GROUPS

There is no legal requirement for an agreement between proponents and Indigenous groups —there is no "duty to agree" and Indigenous groups are not entitled to a "veto".[35] However, there are clear and compelling interests from both project proponents and Indigenous communities that may be advanced by a mutually-acceptable commercial agreement.

- From the perspective of the project proponent, project approval goes much more quickly and with less risk if there are agreements in place with key Indigenous groups. In the absence of an agreement, there is much greater scope for and likelihood of concerns being raised in front of Crown decision-makers. In addition, even if project approvals are ultimately successfully obtained, there remains significant scope for post-approval challenges including judicial reviews and appeals. In addition, lack of support (or active opposition) by Indigenous groups also empowers other opponents of the project, such as environmental non-governmental organizations — all of which has the potential to add delay and risk to the permitting process. Having the support of an Indigenous community can provide significant commercial advantages by facilitating the permitting process and materially de-risking the project. In short, a negotiated commercial agreement is a way to create legal certainty, which the law on its own does not provide.
- From the perspective of an Indigenous community, negotiations can be a means to obtain benefits from a project for the community. A project proponent is going to be motivated to seek support from Indigenous communities in order to decrease the risk associated with major government decisions regarding the project. Once major project approvals are in hand, a proponent may still be motivated to reach agreements in order to remove residual risk from litigation or project delay. However, it should be kept in mind that, as the project moves ahead, an increasingly large part of what a

(B.C.C.A.). See also *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, at para. 161, 1999 BCCA 470 (B.C.C.A.) and *Haida*, *supra*, note 9, at para. 36.

[35] *Haida*, *id.*, at paras. 47-49.

> proponent is bargaining for (*i.e.*, expedited project approval with reduced risk) is no longer available. In short, projects can reach a point where the support of a particular Indigenous community is simply less valuable from a purely commercial perspective. At this point the negotiations may become more challenging.

While agreements, in most instances, are not a legal requirement, they are an effective tool to remove uncertainty. As the Supreme Court of Canada has noted: "Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[36]

1. The Building Blocks of an Agreement

While each agreement is unique, the typical elements of a commercial agreement are various benefits (employment, business opportunities and financial) in exchange for an Indigenous group's support for the project. Proponents have tools available to them in negotiations that the Crown often lacks or may be more constrained in employing.

Accommodation of Indigenous interests may take various forms. The most basic form is *avoidance* of impacts to Indigenous interests — perhaps by changes or modifications to the project. In the same vein, if potential impacts can be *minimized* or *mitigated*, this can constitute a form of accommodation. A proponent is likely to have a greater understanding of the options (and feasibility of the options) for alterations to a project that might avoid or mitigate potential impacts. Finally, where impacts can neither be avoided nor mitigated, then *compensation* may be considered.[37]

2. The Parties[38]

The vast majority of impact benefit agreements are directly between industrial proponents and Indigenous groups. Generally speaking, the Crown is not a party to such agreements, notwithstanding that it is the

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[36] *Tsilhqot'in Nation*, *supra*, note 6, at para. 97.

[37] It is still an unsettled question at law whether the duty to "accommodate" can include "economic compensation".

[38] An earlier draft of the remainder of Part 4 was presented by the author as speaking notes at a panel discussion at the 53rd Rocky Mountain Mineral Law Institute in Vancouver, B.C.

Crown that has the legal duty to consult and, if necessary, accommodate. The Crown has proven to be a reluctant participant in such arrangements and so, in practice, industrial proponents are typically entering these agreements on their own to discharge, in part, the Crown's legal obligations.[39]

Challenges can arise in identifying, with precision, the Indigenous organization that properly represents or speaks for the people asserting the claimed rights or title. Some Indigenous groups in Canada are organized into Bands pursuant to the *Indian Act*. However, many Bands have further organized themselves into Tribal Councils or "Nations". Sometimes these organizations are incorporated under regular corporate statutes such as a provincial or territorial *Society Act*. Further, there are Métis people who may hold constitutional rights but who may not be represented by any of the organizations discussed above. In areas where modern land claim agreements are under negotiation or have been signed, Indigenous groups are frequently represented by land claim corporations or governments which may have been created to hold or exercise certain rights pursuant to the land claim agreement. There can be issues associated with the capacity of such corporations to enter into a private contractual agreement with an industrial proponent. Determining the membership of these various organizations and their authority to speak on behalf of the effected Indigenous groups is not always straightforward.

3. Employment Opportunities

An issue that often attracts great interest is the employment opportunities presented by an industrial project. Generally, the employment opportunities that seem to be the best fit between the desires of Indigenous groups and the needs of industrial proponents are those that are of a lasting or ongoing nature. Some of the employment opportunities, such as those related to initial construction of the project, are often too short-term to meet the needs of either party. Indigenous groups may not

[39] Of course, the Crown also employs agreements to address consultation obligations. For example, the Government of British Columbia has entered into a number of Economic and Community Development Agreements with First Nations. These agreements provide for revenue sharing in respect of new mines and major mine expansions in First Nations' traditional territories. These agreements provide annual payments to the respective First Nations which are tied to the amount paid by the proponent under the *Mineral Tax Act*. The recent agreements also set out in a step-by-step manner the consultation and accommodation process to be followed in respect of any Crown decisions regarding the mining project in question and provides that so long as the Province complies with the process as set out, the Provincial Agencies will be deemed to have fulfilled any duty to consult with respect to a Government Action that may adversely affect the First Nation's interest.

have people with experience in the types of short-term opportunities available. If the term of employment is too short to obtain the requisite experience on the job, the experience may not be successful for either employee or employer. Often, in order to make these types of employment arrangements successful, support structures such as training or apprentice opportunities (or even providing educational opportunities) are helpful.

4. Business Opportunities

Business or contracting opportunities may be another vehicle to meet the needs of both parties. Many Indigenous communities have established contractors that may be either owned directly by the Indigenous group or owned or controlled by Members. These may provide opportunities for Indigenous groups to participate in the benefits of a project and provide a needed service to industrial proponents. These business opportunities may be specifically identified in an agreement. Alternatively, targets or a fixed amount of contracting opportunities may be negotiated. Occasionally, the agreement will be limited to "best efforts" to utilize Indigenous contractors.

Again, these contractual commitments are most often successful if suitable support structures are in place. These may include advanced notice of contracting opportunities or business opportunity seminars aimed at potential Indigenous contractors. In some cases, there may also be a commitment to provide a critique of unsuccessful bids in order to identify potential problems. Negotiators may also consider opportunities to subdivide larger pieces of work into subcontracts that are a suitable scale for potential Indigenous bidders or contractors.

5. Financial Consideration

A common feature of such agreements is monetary payments. Often, too much attention is placed on negotiating the total amounts while insufficient attention is given to structuring the payments in a way that meets the needs of both parties. Generally, the least successful structure is a single one-time, lump-sum payment upon signing the agreement. This does little to build an ongoing relationship and can be detrimental to the ongoing long-term success of an agreement. An annual or periodic payment structure is preferable. Some have entered agreements that match the payment to the anticipated cash flow resulting from

production. For example, financial consideration can be linked directly to a percentage or production-based payment system. The amount of payments can also be tied to commodity prices.

Another form of financial consideration can include provision of shares, options, warrants to Indigenous groups — either in lieu of or in addition to straight financial payments. More rarely, impact benefit agreements may include terms whereby Indigenous groups can become partial owners of some or all aspects of a project. Where a more sizable equity interest is at stake, it is common for Indigenous groups to purchase their interest.

6. Communications Committees or Structures

Many agreements include a mechanism for ongoing communication between the Indigenous group and project operator. One such mechanism is an implementation committee comprised of representatives of the project owners/operators and the Indigenous group. Occasionally, government representatives will be invited to participate in (some) committee meetings. An alternative or supplemental arrangement may employ a liaison person, typically from the Indigenous group membership, to facilitate ongoing communications between the industrial proponent and Indigenous group.

These ongoing communication structures provide a means to monitor and review results, provide a forum for feedback or updates and facilitate the arrangements regarding employment and contracting. Such communication structures may be supplemented by periodic reports or meetings with the Indigenous community as a whole. Care should be taken in defining the mandate of such committees. Industrial proponents need to avoid creating the impression that such a committee will act as a further regulatory authority. The true sign of the success of an impact benefit agreement is when both sides come to view the formal structure of the committee or liaison mechanisms as unnecessary because the naturally occurring communication is both regular and sufficient.

7. Legal Certainty and a Competitive Advantage

For these agreements to be successful, they have to provide value to the project proponent, as well as providing benefits to Indigenous groups. The typical goals of industrial proponents in entering these agreements

are (i) to obtain legal certainty; and (ii) to create an approval and operating environment that is timely, cost effective and provides a competitive advantage. The yardstick against which industry typically measures such agreements is by determining whether the agreement results in an operating environment that puts the operator in a more favourable position compared to the environment it would face in the absence of an agreement. Licences, permits and approvals may be obtained more quickly with the risk of legal challenges reduced or eliminated. Such arrangements should give project proponents a competitive advantage over similarly situated proponents that are unwilling to enter such agreements.

A typical objective of the industrial proponent is to seek the support (or at least non-opposition) of the Indigenous group to the project. There may be negotiations regarding the scope of the support. For example, the support may be only to the issuance of a single key authorization, with subsequent authorizations to be the subject of separate discussions. Alternatively, it may be support for all requisite authorizations and operating permits for the project.

For existing projects (that may be an expansion, alteration or extension to operations), a frequent issue of concern to the Indigenous groups is the past impacts of past, existing or related projects. The Supreme Court of Canada has clarified that,

> the duty to consult is confined to the adverse impacts flowing from the *current* government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.[40]

Generally, project proponents have been reluctant to negotiate regarding the impacts of past projects — preferring to leave this to more comprehensive settlement negotiations between governments and Indigenous groups. In recognition of this quandary, some agreements expressly exclude any past impacts (and authorizations) from the scope of the agreement — essentially leaving this difficult issue to be sorted out another day (perhaps by governments).

Consideration needs to be given as to how the support of the Indigenous group will be communicated to the Crown decision-makers

[40] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, [2010] 2 S.C.R. 650 (S.C.C.).

who are charged with issuing the requisite permits, licences and authorizations. Typically, this is done by way of a letter from the Indigenous group to the regulatory authorities. The language of such a letter is often a subject of negotiations.

8. Commercial Terms

Like any commercial agreement, there are a variety of issues that will need to be addressed in impact benefit agreements between Indigenous groups and industrial proponents, including dispute resolution, force majeure, termination, *etc*. These provisions generally differ little from those found in ordinary commercial agreements.

9. "Market" Terms

Generally, these agreements remain entirely confidential as between the parties.[41] The natural desire of both parties is to seek out and invoke comparable agreements. However, both parties generally face severe informational constraints. As a result, it can be challenging to identify "standard" terms. However, more fundamentally, there really are no "market" terms when it comes to such agreements. As discussed above, the primary purpose of these agreements from the perspective of a project proponent is as a risk mitigation tool. The reality is that different proponents may view (and value) risk differently and, accordingly, may place a different value on the legal certainty benefits that it may derive from an agreement.

10. Concluding Thoughts on Agreements

There are a number of elements that set impact benefit agreements apart from the usual variety of commercial agreement. Primary among these is that relationship building is a central theme and objective of the agreement. Ensuring true community support for the project often involves more than simply ensuring that the right language is included in the agreement. If properly managed and implemented, such agreements can create a useful and secure foundation for project development and operation that is built on a foundation of mutual respect.

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[41] On rare occasions, a proponent that is publicly listed may feel compelled to publicly disclose an agreement as a material contract under securities law requirements.

VI. PART 5 — CONFIDENTIALITY: A PRACTICAL CHALLENGE IN THE TWO-TRACK APPROACH

There can be some practical challenges arising from the two-track approach outlined above. Foremost amongst these is the practical challenge arising from both parties' interests in and need for confidentiality. With some advance planning and discussion, this can be addressed with a practical approach — often recorded in a written confidentiality protocol.

The first step is for both parties to recognize that they are engaged in two tracks of discussion, which may occur simultaneously:

- a "public record" discussion, which includes matters such as a description of the project, status updates, the regulatory processes, ongoing studies and baseline work, expressions of concern about the project and/or discussions aimed at potentially addressing environmental and/or other concerns in respect of the proposed project; and
- a "negotiation" discussion in relation to potential mutually-acceptable impact-benefit agreement or similar arrangement.

It is important that both parties recognize the legitimacy of both discussions, but further recognize that each discussion involves different needs and information requirements:

- In the public record discussion, there is a need to reflect both the process undertaken and the substance of the discussions. This can be achieved, in part, by preparing minutes of meetings that will be circulated following each meeting. Any concerns regarding the content and/or accuracy of such minutes can then be addressed in a timely way. These minutes then become part of the consultation record, discussed above.
- In the negotiations discussions, both parties may recognise a need to create space for such negotiations to facilitate a full, frank discussion. In order to create this space, the parties may, by mutual agreement, conduct negotiations on a without-prejudice basis. At the same time, the parties will want to be careful not to undermine the integrity or the accuracy of the "public record" discussion.

For the negotiations, one possible approach is to limit the extent to which that discussion will be recorded for the public record to include only limited information, such as:

- The fact of meetings (including the date, duration and location);
- The name and titles of attendees at the meetings; and
- The general issues discussed (*e.g.*, financial accommodation proposal, counter-offer, exploring alternative proposals, *etc.*).

Beyond these procedural records, the substance of the "negotiation" meetings may, by mutual agreement, be conducted on a without-prejudice basis.[42] However, it is also advisable that both parties reserve the right to make a with-prejudice offer at any time for any reason.

With these two processes running in parallel, it creates the potential for confusion or blending of the two lines of discussion. In order to reduce the likelihood for such confusion, the parties may be required to exercise some discipline in setting agendas for the meetings and identifying topics for discussion that have the likelihood or potential to raise items properly discussed on a without-prejudice basis. Similarly, during meetings, parties should exercise discipline in assuring without-prejudice conversations are saved until the appropriate portion of the meeting. Notwithstanding that "negotiations" discussions may be conducted on a without-prejudice basis, both parties may derive value from having a record of such discussions for their own internal purposes — such as aiding recall, briefing any new members that join either negotiating team and similar purposes. Accordingly, minutes can also be kept of the without prejudice discussions, but care should be taken so they are segregated from the public record minutes.

VII. PART 6 — CONCLUDING THOUGHTS

This article has attempted to (i) identify some challenges that arise for both proponents and Indigenous communities in the context of major projects; and (ii) outline a practical approach to addressing those challenges. The two-track approach discussed above can be visualized as follows:

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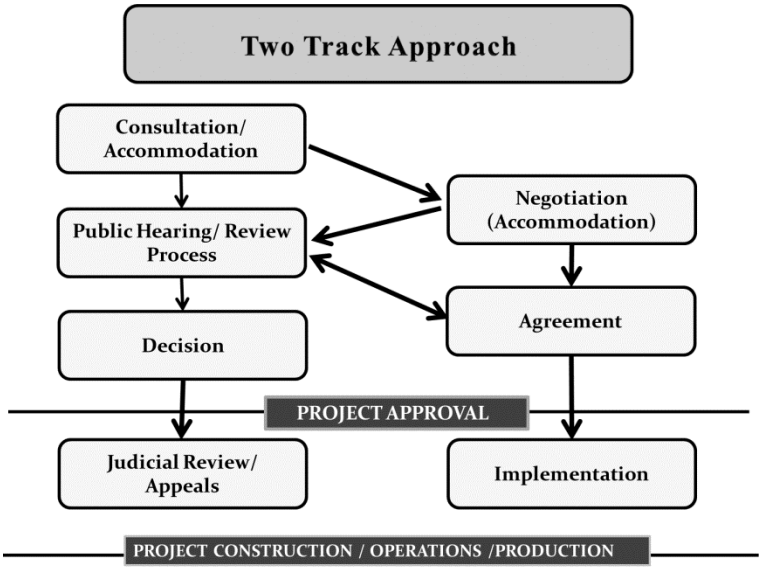
[42] For a cautionary tale regarding the evidentiary challenges that can arise when both consultation and negotiation discussions are held on a without prejudice basis (or the division between the two is unclear), see *Lax Kw'alaams Indian Band v. Canada (Minister of Western Economic Diversification)*, [2007] F.C.J. No. 744, 2007 FC 550 (F.C.).



1. The Path Ahead

While the focus of this discussion has been on practical approaches that both project proponents and Indigenous communities might employ, it is important not to lose sight of (i) the overarching role of the Crown; and (ii) the overarching goal of reconciliation.

- Proponent-led consultation is important, but it is often only a supplement — not a substitute — for Crown consultation. Proponents are well-placed to address issues directly related to the project; however, consultation often involves other, overlapping topics, including cumulative effects, land use planning and other processes that are generally beyond the ken of the proponent. More fundamentally, the Crown is the primary actor in relation to broader reconciliation discussions, including treaty negotiations and implementation, which often inform and influence the consultation process regarding a specific project or approval.
- Agreements between a proponent and Indigenous group can often go a long way towards accommodating Indigenous groups. However, the negotiation of these agreements can also be influenced by many factors that are entirely disconnected from the strength of claim and/or seriousness of potential impacts. Different proponents have

> different risk tolerances and varying degrees of openness to commercial agreements with Indigenous groups. Similarly, different Indigenous communities may vary considerably in their interests and capacity to negotiate a successful commercial agreement.

Consultation and negotiations between proponents and Indigenous groups essentially involve a bi-lateral effort to solve a tri-lateral problem. In their most successful form, the bi-lateral discussions may, in part, resolve issues that the Crown alone was unable to resolve. While such bi-lateral discussion often cannot address *all* of the broader goals and requirements of the relationship, the two-track approach outlined above can, if properly employed, considerably advance both the interests of a project proponent and simultaneously advance the community interests of an Indigenous community in relation to specific project.

That alone may constitute a small step along the path towards reconciliation.