Managing Aboriginal Risk for Resource Projects in Canada

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Aboriginal issues are one of the most common sources of regulatory delay and uncertainty for new natural resource development projects in Canada, and are often the reason that regulatory approvals are quashed. It is therefore critical that proponents of natural resource development projects understand the legal requirements and risks associated with Aboriginal and treaty rights and related consultation, and develop strategies to manage these risks.

While Aboriginal law in Canada continues to evolve, the basic legal principles that govern Aboriginal consultation are well established. The duty to consult with Aboriginal groups is a constitutional obligation on the Crown (i.e., the federal or provincial government) that arises when the Crown has knowledge of the potential existence of an Aboriginal or treaty right and contemplates conduct that may adversely affect it (e.g., contemplates issuing a permit for a project that may affect one or more Aboriginal groups). This duty applies to First Nations, Inuit and Métis. The scope of the Crown’s consultation
obligation is proportionate to the strength of the asserted Aboriginal and treaty rights, as well as the seriousness of the impact of the government decision on those rights. Absent significant potential impacts on Aboriginal and treaty rights, the duty boils down to an information sharing requirement between the government or the project proponent (who is often delegated procedural aspects of the consultation) and the Aboriginal group to ensure that development of the project occurs in a manner that takes into consideration potential impacts on Aboriginal and treaty rights and interests. In no case does the duty to consult grant Aboriginal groups a veto over the project.

The project proponent can effectively manage the legal and regulatory risks associated with Aboriginal consultation by developing an Aboriginal strategy early in the life of a proposed project. This strategy should generally consist of the following:

1. Early Identification of Aboriginal Groups: The project proponent should first identify any Aboriginal or treaty rights that may be affected by the project in question, as well as the likelihood and magnitude of any such impacts. If impacts are identified, the proponent should consider whether there are ways to modify the project to minimize these effects.

2. Comprehensive Consultation Program: The key objectives for any consultation program should be to keep all potentially affected Aboriginal groups informed of the project, provide them opportunities to review project information (possibly including capacity funding), and provide opportunities for each group to identify issues and concerns with the project. All information exchanged, and any concerns raised by Aboriginal groups, should be thoroughly documented in a consultation record.

3. Negotiated Agreements: Aboriginal risks may be managed through entering into voluntary commercial agreements with potentially affected Aboriginal groups. If this is something the proponent wishes to pursue, it should commence serious negotiations once the consultation process has been established and the Aboriginal group’s concerns are understood.

4. Long-Term Relationship through Life of Project: Once the project is approved and operating, the proponent should continue engaging with each potentially affected Aboriginal group throughout the life of the project. A good working relationship with Aboriginal groups should be the ultimate goal of any consultation or engagement strategy.

As Aboriginal law in Canada continues to evolve, project proponents should keep abreast of major developments to ensure that any changes in the law are incorporated into their Aboriginal strategies. For example, there are currently a number of judicial review proceedings before the courts that will consider the extent to which regulatory processes can be used as the primary means of satisfying the Crown’s duty to consult. The recent election of a Liberal government in Canada has increased Aboriginal expectations for more robust consultation with the Crown, and for the government to deliver on its campaign promise to reform existing environmental assessment processes. In addition, details are expected to be released over the next year to clarify disclosure requirements under the federal Extractive Sector Transparency Measures Act for payments to Aboriginal groups. Each of these developments could have important implications for how proponents consult with Aboriginal groups that may be affected by their projects.
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