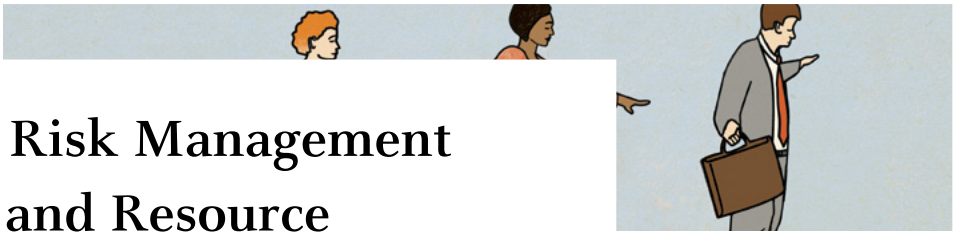

# Risks and Risk Management in Project and Resource Development

*by Tom Isaac & Maureen Killoran Q.C.*

Companies in the energy and mining sectors have long been accustomed to managing risk, balancing exploration investments against the probability of finding a prospective mineral, for example, or using cost discipline to hedge against the possibility of commodity price declines. But risk management skills are increasingly required in the development of projects too, as negotiations, disputes and litigation have become almost standard features of every stage of a given initiative.

Behind this sweeping change lies the recognition of the Crown's "duty to consult" with Aboriginal peoples, which was codified by Supreme Court of Canada rulings in 2004 and 2005. Since that time, consultation processes for resource and other projects have been implemented as the dominant means of protecting Aboriginal and treaty rights and of balancing Aboriginal and other societal interests. Today, such processes act as both a framework for reconciliation and, increasingly, an arena of dispute.

Recent developments show the trend evolving in new directions. First, some limits are being set. In response to a challenge brought forward by the Stellat'en First Nation in *Louis v. British Columbia*, the B.C. Court of Appeal made it clear that the Crown's duty to consult Aboriginal groups only pertains to new or "novel" impacts on Aboriginal rights and does not require the re-visiting of previous authorizations. Similarly, in *Behn v. Moulton Contracting Ltd.* the Supreme Court of Canada affirmed that the Crown's duty to consult cannot be used to challenge decisions that were not opposed at the time they were being made.

Second, consultation frameworks are themselves shifting. New frameworks that have been developed by Alberta, Newfoundland and Labrador, and Ontario effectively shift responsibilities from the Crown to project proponents. Alberta has centralized its consultation process and is in the process of re-allocating responsibilities among participants. Ontario's new *Mining Act* imposes extensive responsibilities on proponents, including the submission of detailed "exploration plans" before exploration activities begin. Newfoundland and Labrador's policy, meanwhile, marks an unprecedented shift in the burden of consultation from the Crown to project proponents: companies are to pay the full costs of consultation on behalf of Aboriginal groups, for example, and are also required to provide financial "accommodation" for adverse effects of Aboriginal rights – a duty that legally rests with the Crown.

Third, litigation between project proponents and the Crown has emerged. Northern Superior Resources recently filed a Statement of Claim against the Government of Ontario alleging that the government failed to properly discharge its duty to consult, a failure that led to disputes between Northern Superior and affected First Nations and to the eventual abandonment of its mining claims. New policy uncertainties will likely only increase the odds of cases like this being pursued more often.

The general increase in risks stemming from consultation-based litigation and regulatory change has important implications for resource projects in Canada. One of the most immediate impacts is simply delay. With every stage of the consultation process now offering its own opportunity for litigation, repeated halts are all but certain – and with delays come the costs of idle employees and equipment, and the potentially much greater opportunity cost of resources left in the ground.

### Successful Elements of a Strong Aboriginal Consultative Process

**Upfront Planning**
*Integrate a litigation strategy into your overall project plan and identify litigation risks by each phase of development*

**Right Team**
*Identify all the relevant stakeholders and ensure they play a role in the assessment and mitigation of risk*

**Alternative Solutions**
*Alternative project development methods may reduce regulatory requirements and litigation risk*

**Budgeting**
*Allocate for the time and capital needed to address any contentious issues that arise*

**Communication**
*Ensure investors and others have an understanding of the costs and time frame up front*

Direct costs can also mount quickly. Negotiations require negotiators, litigation requires litigators, and reworking exploration or engineering plans often requires the services of external consultants. Benefits agreements, meanwhile, come with their own price tags; the consultation costs of Aboriginal communities must often be covered by proponent firms; and the potentially broader – and still as yet undefined – responsibility for financial accommodation may push direct costs far higher.

A final impact faced by companies is on their costs of capital and their balance sheets. Investors tend to price uncertainty into their willingness to pay for a company's stock, and the greater the uncertainty a company faces in its ability to bring resources to market in a timely fashion, the lower the price it will realize for its equity (or the greater the interest it will pay on its debt). The value a company places on a specific property will vary for the same reason, and a parcel does not have to be put up for sale for its loss of value to be made tangible: Northern Superior, for example, wrote off $110 million when it abandoned its claims.

We see no sign of such risks abating in future. Indeed, we anticipate novel forms of litigation arising in the next few years from the duty to consult and from the general principle of the "honour of the Crown," from which the duty to consult derives. Resource project proponents must continue improving their risk management capabilities while at the same time making thorough and thoughtful efforts to participate effectively in the consultation processes relevant to the areas in which they operate.

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