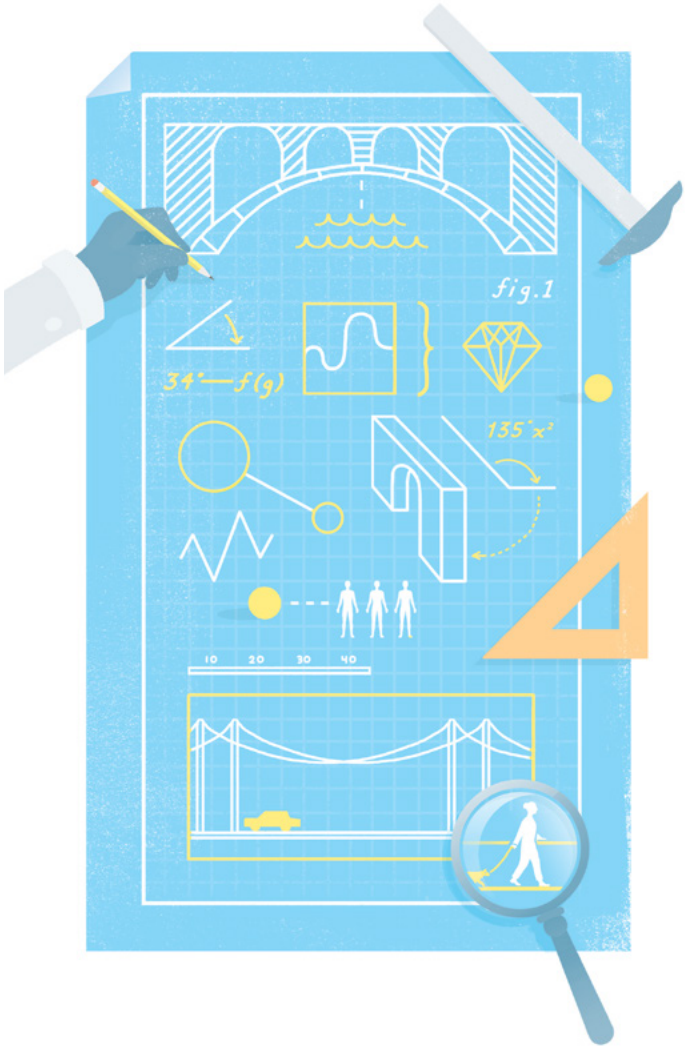
Beginning with the End in Mind

by Maureen Killoran Q.C. & Thomas Isaac



The management of litigation risk in the resources sector is an activity that begins on Day 1 of a proposed project's life, and continues through all project development phases.

In Canada, top risks for 2014 include the increasing number and scope of Aboriginal-related consultation litigation, changes to regulatory policy in certain provinces that have, sometimes unduly, "downloaded" responsibilities to project proponents, and disputes between proponents and governments over procedural fairness regarding governmental approval processes and Aboriginal issues.

Litigation can now be expected at every stage of a project's consultation process

Canada's recent surge in energy and mining projects has brought with it an increasing amount of litigation by affected First Nations and Aboriginal groups. The Crown's "duty to consult," and the modern project consultation process that instantiates it, are at the centre of this litigation, with actions occurring now at every stage of a given process – from pre-project planning all the way to the issuing of permits for construction.

Decisions in 2013 have helped to limit the scope of consultation to a specific proposal at a specific time. For example, 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 to Aboriginal rights and does not extend to the re-visitation of previous authorizations – a ruling similar to 2011's *Upper Nicola Indian Band v. British Columbia*, by the B.C. Supreme Court. In *Behn v. Moulton Contracting Ltd.*, meanwhile, the Supreme Court of Canada affirmed that the duty to consult cannot be used as a "collateral attack" to challenge decisions that were not opposed at the time they were being made.

All-stage litigation can obviously impact the success of an entire project, and shareholder returns are normally contingent upon the project moving along at a reasonable pace. What is more, "duty to consult" is only one aspect of the more general principle of the "honour of the Crown" – the requirement for government to treat Aboriginal peoples fairly in all dealings with them. We anticipate novel forms of litigation arising in the next few years from other ways the principle of the "honour of the Crown" could be used by Aboriginal peoples to challenge Crown decisions and actions.

Selected Best Practices

1. **Plan and implement an airtight consultation process**
   Approach the process in a manner that is reasonable, transparent, and that is properly and thoroughly documented. Ensure a sufficient level of government involvement and oversight.

Recent regulatory changes have increased burdens on proponents

With the avowed intent of reducing uncertainty, new consultation frameworks have been developed recently by Alberta, Newfoundland and Labrador, and Ontario that effectively shift responsibilities from the Crown to project proponents. In Alberta, the province's new Policy on Consultation with First Nations on Land and Resource Management has centralized the consultation process in the Aboriginal Consultation Office (ACO), and is in the process of allocating responsibilities among First Nations, project proponents, and the ACO itself. A revamped Ontario *Mining Act* now requires the submission by proponents of thorough "exploration plans" before activities begin, along with detailed consultation at each stage of the project development process, while Newfoundland and Labrador's new policy involves 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 on Aboriginal rights (a duty that rests with the Crown as the Supreme Court of Canada has already confirmed).

Such changes being new, and certain important concepts (like accommodation) being still only loosely defined, the net result of these policies may be to increase uncertainty, not lessen it. Further, a substantial transfer of responsibilities to proponents may not meet the standard required by the honour of the Crown. Nevertheless, it is clear that for proponents, more thorough and thoughtful efforts must be made to meet the legal, policy and regulatory standards now required.

Selected Best Practices

1 **Plan holistically**

A proponent's strategic consultation process should align with its government relations, legal and regulatory strategies, and vice versa.

The net result of these policies may be to increase uncertainty, not lessen it.

Questions of procedural fairness may spark litigation by proponents

With new burdens and new uncertainties come the risk of disputes among participants and even of litigation by proponents against the Crown, particularly if a given regulatory regime is not being effectively managed. While such action would typically be a remedy of last resort, a recent case illustrates that such scenarios have already begun to occur.

In fall 2013, Northern Superior Resources filed a Statement of Claim against the Government of Ontario alleging that the government failed to properly discharge its duty to consult with First Nations in regard to a number of gold properties in northwestern Ontario. Stemming from this failure, says the company, disputes arose between Northern Superior and affected First Nations, eventually halting any opportunity for further development. Its mining claims now abandoned, Northern Superior now seeks damages for the amounts it spent on exploration and for the decline in value, estimated at $110 million, of the properties themselves.

Similar litigation may also arise if it is perceived that a company is being treated unfairly by government or subjected to arbitrary decision-making – in cases of major procedural delays, for example, or where a proponent believes that its own interests are not being kept in balance with Aboriginal interests.

Selected Best Practices

1 **Litigate as a last resort**

Though proponents have a right to a fair, transparent, and reasonable regulatory process, they should consider their options very carefully before embarking on litigation against the Crown – and they should ensure that their own participation in the consultation process has been carried out to a high standard throughout.

To discuss any of the issues and risk management strategies raised above, please contact:

Maureen Killoran Q.C.
Partner, Litigation
mkilloran@osler.com
403.260.7003

Thomas Isaac
Partner, Litigation
tisaac@osler.com
403.260.7060