# ABORIGINAL LAW

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overview</td>
<td>85</td>
</tr>
<tr>
<td>Aboriginal Rights and Interests</td>
<td>86</td>
</tr>
<tr>
<td>Treaties</td>
<td>86</td>
</tr>
<tr>
<td>Consultation and Accommodation</td>
<td>86</td>
</tr>
<tr>
<td>Successful Agreements with Aboriginal Groups</td>
<td>88</td>
</tr>
<tr>
<td>Projects on Aboriginal Lands</td>
<td>89</td>
</tr>
<tr>
<td>Conclusions</td>
<td>89</td>
</tr>
</tbody>
</table>

*By John Doolan*
ABORIGINAL LAW

Business transactions in Canada sometimes involve a nexus to Canada’s Aboriginal communities. Where Aboriginal issues exist for any proposed transaction, it is important to consider the issues in the context of the current law and prudent business practices and to develop business strategies that are most likely to achieve the desired results.

Overview

Aboriginal rights and claims are frequently implicated by the acquisition and development of land and natural resources in Canada. This is of considerable interest to businesses involved in the energy, mining, forestry and transportation sectors, particularly with respect to developments and activities on lands subject to claims of Aboriginal rights or title.

In 1982, Canada voluntarily amended its Constitution to, among other things, “recognize and affirm” the existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada in Section 35 of the Constitution Act, 1982. The term “Aboriginal Peoples” includes First Nations (for historical reasons originally, and incorrectly, referred to in Canada as “Indians”) as well as the Inuit and Métis peoples of Canada.

Canada’s federal Parliament has exclusive legislative jurisdiction over “Indians and lands reserved for Indians,” and has enacted legislation including the Indian Act, the First Nations Fiscal Management Act, the First Nations Land Management Act and the Indian Oil and Gas Act. First Nations and Inuit are under such federal jurisdiction, and, in April 2016, the Supreme Court of Canada confirmed that the Métis are also under federal jurisdiction, an issue that had previously been unclear at law.

The law regarding Aboriginal rights and title is constantly evolving and business practices relating to Aboriginal communities often change to keep up with developments in the law, government policies and the expectations of these communities. In addition, Aboriginal groups are becoming increasingly active in the commercial marketplace as equity participants and in public-private partnerships. It is important to understand both the stakeholders as well as the issues involved with the making of contracts and the taking of security where Aboriginal participants are involved.
Aboriginal Rights and Interests

Aboriginal rights are those rights that have been traditionally exercised by Aboriginal Peoples, including customs, traditions and activities integral to the distinctive culture of the Aboriginal group in question. Aboriginal rights can include rights that have been traditionally enjoyed by the members of an Aboriginal group, such as hunting, trapping, fishing and gathering. Where Aboriginal rights exist, a requirement for a Crown decision or approval will trigger the need to consult with and accommodate the relevant Aboriginal groups. In cases where Aboriginal title is proven, the Aboriginal right includes the right to land itself and consultation and accommodation will not be sufficient to allow a project to proceed.

To date, Aboriginal title has only been established definitively in one case. In 2014, the Supreme Court of Canada found that the Tsilhqot’in Nation had established aboriginal title over a tract of land in central British Columbia. The Court held that if Aboriginal title is proven, the consent of the Aboriginal group is required in order for the Crown or a proponent to proceed with development or use of the Aboriginal title lands. Absent such consent, the Crown would need to justify any proposed incursion onto the land or infringement of title by a compelling and substantial governmental objective that was consistent with the Crown’s fiduciary duty to the Aboriginal group.

Treaties

Many Aboriginal Peoples have rights set out in historic and modern treaties. Treaties involve the resolution of historical disputes and claims and the creation of certainty as to the rights and interests of particular Aboriginal Peoples. Much of Northern Canada is covered by modern treaties, and a large portion of Southern Canada is covered by some form of historic treaty. The notable exception is British Columbia, much of which remains largely uncovered by treaties. There are also a number of unsettled comprehensive claims elsewhere in Canada, including those in Ontario, Québec, Newfoundland and Labrador, New Brunswick, Nova Scotia, the Northwest Territories and Yukon.

Consultation and Accommodation

As noted above, developments on property affected by Aboriginal claims or interests may be subject to a legally required consultation process with Aboriginal Peoples.
affected by Aboriginal claims or interests may be subject to a legally required consultation process with Aboriginal Peoples. The constitutional recognition and affirmation of Aboriginal and treaty rights requires the Crown (which includes the federal and provincial governments) always to act honourably when dealing with Aboriginal Peoples. In circumstances where the Crown is considering whether to issue an approval or make any other decision that might adversely affect an Aboriginal interest, the Crown has a duty to consult, and, where appropriate, to accommodate Aboriginal Peoples. This Crown duty arises when the Crown is aware or ought to be aware of the potential existence of an Aboriginal interest and contemplates a decision or action that might adversely affect such interest. The circumstances around the Crown’s duty may be quite complex, and in some cases a single decision of the Crown may potentially impact a number of different Aboriginal Peoples that may have overlapping claims or interests.

There is no stand-alone duty on the Crown or a project proponent to reach agreement with Aboriginal Peoples, but good faith consultation may give rise to a duty on the part of the Crown to accommodate Aboriginal rights or interests that will be impacted by a Crown decision. At law, accommodation can include mitigating, minimizing or avoiding adverse effects of actions or decisions on Aboriginal interests. What amounts to appropriate Crown consultation and accommodation is a matter for legal analysis on a case-by-case basis. The content of the Crown’s duty varies with each project or approval and the duty does not require the same degree of consultation in all instances where it is engaged. The scope of the Crown’s duty to consult exists on a spectrum, and is proportionate to the strength of the case supporting the existence of the Aboriginal interest and the degree of the potential adverse effect of the Crown’s decision on such interest. Inadequate Crown consultation can lead to approvals or permits being delayed or called into question, community and investor relations’ challenges or litigation for injunctions or damages, all of which can have serious impacts on project schedules and costs.

Although the duty to consult is ultimately the responsibility of the Crown, the courts have stated that procedural aspects of this consultation may be delegated to and carried out by private entities. It is not uncommon for the Crown to pass on certain requirements associated with the duty to consult to project proponents who are seeking government approvals. In many cases, the proponent will have the greatest familiarity with the
proposed project and will be best suited to engage with Aboriginal groups and to address any relevant concerns in a meaningful way.

Many Aboriginal groups have developed their own consultation policies and processes for engaging with proponents and the Crown, and many have capacity funding requirements. Current trends in consultation processes include proponents being asked to fund third-party heritage and environmental assessments and studies to determine the extent of Aboriginal interests and the potential impact of proposed projects, and often a form of funding agreement is presented to a proponent.

Within the context of major resource projects, the Crown’s duty to consult usually will be triggered at the formal commencement of the regulatory review process. However, many proponents choose to engage with Aboriginal groups from the earliest stages of project planning in order to build relationships with local communities. Effective consultation and engagement with Aboriginal groups has become one of the most critical factors affecting the viability and ultimate success of a project and therefore should be treated as an integral part of project planning and development. Experienced legal advice is required to guide the proponent through the consultation and approval process in order to ensure that all relevant Aboriginal groups are being consulted and that the Crown’s duty is properly carried out and documented for evidentiary purposes.

**Successful Agreements with Aboriginal Groups**

There is currently no requirement at law for the Crown or proponents to enter into agreements with Aboriginal groups in order to fulfill the Crown’s duty to consult or accommodate Aboriginal Peoples, and there is no requirement at law for accommodation to include providing economic compensation to Aboriginal groups. However, it is common for federal and provincial governments to promote agreements such as impact benefit agreements or participation agreements between project proponents and Aboriginal Peoples. In some cases, a province will also enter into an agreement where tax or other government revenue is shared with interested Aboriginal groups. Reaching successful agreements can assist in addressing the concerns of Aboriginal groups, establish stable frameworks allowing development projects to move forward and provide an effective means of managing Aboriginal-related risks and establishing regulatory certainty for projects.
The scope and content of benefit and participation agreements vary widely among projects and Aboriginal groups. Understanding the specific interests and objectives of an Aboriginal group and having experience with the different types of agreements in use form a foundation towards the development of a successful relationship with Aboriginal groups and ultimate project approval. Agreements with Aboriginal groups can include a variety of benefits for the Aboriginal group, including employment opportunities, support for education and training initiatives, contracting and business opportunities, and capacity building, generally with corresponding assurances to the proponent that create certainty and facilitate the development of the project. In some cases, agreements will formalize engagement processes and include environmental monitoring and protection commitments.

Major projects increasingly provide for equity participation or other economic benefits, through a variety of financial models, for affected Aboriginal groups that are seeking to secure ownership interests and long-term revenues for their communities. Projects that involve Aboriginal equity participation often involve more sophisticated advice in order to ensure that the project is financeable and employs the most efficient tax structure for all parties.

Projects on Aboriginal Lands

Increasingly, projects and project assets are being located on lands held by Aboriginal Peoples themselves. There are different types of Aboriginal lands and political structures in Canada and a number of different regimes that may apply. Specific knowledge of the applicable regime is critical. Federal laws often do not adequately cover developments on Aboriginal lands and both federal and provincial regulators often have significant concerns regarding matters, such as the lack of applicable provincial environmental protection regimes, particularly on major projects. In some cases, these concerns are addressed contractually. In others, the federal First Nations Commercial and Industrial Development Act is used by Aboriginal groups, federal and provincial governments and project proponents to voluntarily apply specified provincial laws to projects on Aboriginal lands where there otherwise would be a “regulatory gap” in the federal regime.

Conclusions

Projects in Canada that involve Aboriginal rights and interests require
specialized legal knowledge and experience. The regulatory regimes and case law relating to Aboriginal rights and interests are constantly evolving and it is important to bring the most current information to any project where Aboriginal rights or interests may have an impact. Understanding the potential scope of the rights and interests and building successful relationships and agreements with Aboriginal Peoples from project inception through completion and implementation are key elements of any successful project.

FOR MORE INFORMATION, PLEASE CONTACT:
John Doolan
604-643-7938
jdoolan@mccarthy.ca