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Aligning Resource Development with the Interests of Canada's Indigenous Peoples

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Canada's economic future remains dependent upon energy and natural resource development and therefore inextricably linked to the rights, interests and influence of Canada's Indigenous Peoples. Despite considerable advancement in the domestic law of consultation and accommodation, there is salient unrest and dissatisfaction among Indigenous communities with the current approach to development within their traditional use and ancestral territories ("**Traditional Lands**"). The impact of this unrest and dissatisfaction on resource developers is readily apparent and evidenced by the increased legal, regulatory, financial, and reputational risks associated with permitting delays, operational disruptions, protests, and negative media attention.

In addition, significant progress in the international human rights arena is lending support to Indigenous aspirations and putting further pressure on resource developers to move beyond mere compliance with domestic legal requirements and towards obtaining the informed consent of impacted Indigenous communities prior to development proceeding on their Traditional Lands. The influence of international human rights standards on development within Canada is readily demonstrated by the federal government's recent introduction of Bill C-15 *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* ("**Bill C-15**").

Increasingly, innovative resource developers are able to align their interests with those of the affected Indigenous communities through the use of thoughtful and creative commercial relationships, which has the benefit of allowing their proposed development to progress within realistic and predictable timeframes, and with materially reduced above ground risk.

The Current Approach Does Not Work

In Canada, the rights of Indigenous Peoples are constitutionally protected. The Supreme Court of Canada decision in *Haida Nation v. British Columbia* provides that the Crown is under a good faith duty to consult with impacted Indigenous communities, and where appropriate, accommodate their interests, when the Crown is contemplating action that may adversely affect their rights. The duty often arises in the context of authorizing resource development on Traditional Lands as proponents seek land tenure and environmental approvals. The possibility of the Crown not adequately fulfilling its duty to consult represents a significant source of legal, regulatory, and financial risk for resource developers as permits and approvals are subject to delay and potential invalidation, and the developer is subject to increased costs and possible reputational damage associated with legal challenges.

While the law of consultation and accommodation provides for the right to be meaningfully consulted on resource development, it does not include a requirement to obtain the informed consent of impacted Indigenous communities to the proposed activity on their Traditional Lands. For example, on surrendered historical treaty lands, where an Indigenous Community may have exchanged Aboriginal title for treaty rights to hunt and fish on unoccupied Crown land, the Community does not have the power to veto or stop development. Rather, to the extent its treaty rights are potentially impacted, Indigenous communities at most have only the right to be meaningfully consulted and possibly accommodated. Even in the case of serious impact to the rights of the Indigenous Community, the right to be consulted does not amount to a right to informed consent or a "veto" as the duty to consult does not require the Crown to reach an agreement. While treaty rights need to be respected, the Crown can generally continue to take up and manage the lands and resources in question to balance broader societal interests.

The notable exception to an affected Community holding consent rights over development is where that Community holds some form of "title" to the lands (e.g., statutorily administered *Indian Act* (Canada) reserve lands, Alberta Métis settlement lands, fee simple settlement lands and aboriginal title lands). In *Tsilhqot'in Nation v. British Columbia* for example, the Supreme Court of Canada held that informed consent is required by government or third parties seeking to use aboriginal title lands; and that the government can only justify overriding the affected Indigenous community's wishes where consent is not provided in favour of a demonstrated, broader public good.

Accordingly, while the existing constitutional framework affords some degree of protection for Indigenous interests in Canada, that protection is limited, and, in most areas of Canada where resource development is occurring, does not readily align with the aspirations and expectations of the impacted Indigenous communities. Impacted communities consistently expect to participate in and benefit from resource development on their Traditional Lands, or at least to be provided with a share in the revenues generated therefrom. Indigenous communities are also seeking better protection of their rights from cumulative effects and rights of co-management and environmental stewardship.

To date, resource developers have generally managed these legal and regulatory risks through the conduct of good consultation practices and by entering into impact benefit agreements with potentially affected Indigenous communities. Impact benefit agreements typically contain provisions on how the parties will work together to avoid or mitigate the identified impacts. Where the impacts are substantial, these agreements include various benefits to the affected Indigenous Community to offset the expected impacts including education and training, capacity building, community investment funding, training and employment provisions, business opportunities and in some cases, revenue sharing or participation rights. In exchange, the resource developer is granted some legal certainty with respect to its project; often in the form of a withdrawal of a regulatory intervention or a covenant not to oppose operations, object to regulatory processes, or commence future legal challenges. However, despite good consultation practices and the willingness to enter into these agreements, resource developments today regularly experience significant legal and regulatory challenges.

While many political and practical initiatives between Canadian and Indigenous governments are taking place in an attempt to resolve the apparent disconnect in expectations between resource developers and Indigenous communities, the legal and regulatory frameworks have not yet evolved to where they satisfy Indigenous aspirations. The law of consultation may evolve if and when the proposed Bill C-15 is passed into law however, until it does, resource developers in Canada will continue to face significant risk.

The Intersection of Resource Development and Human Rights

Canada's Indigenous population are part of a rapidly growing global population of Indigenous Peoples. The international human rights community developed the *United Nations Declaration of the Rights of Indigenous People* ("**UNDRIP**"), which affirms the view that Indigenous Peoples require recognition of their collective rights as a people in order for them to fully enjoy their individual human rights. Through UNDRIP, the United Nations does not seek to create new or special human rights for Indigenous Peoples, but rather holds out UNDRIP as an articulation of existing human rights standards as they apply to the unique situation of Indigenous Peoples as culturally distinct and self-determining, and having regard to the challenges created by colonization.

A key element of UNDRIP is the principle of free, prior, and informed consent ("**FPIC**") which, *inter alia*, recognizes an inherent right of Indigenous Peoples to benefit from development on their Traditional Lands. In particular Article 32(2) of UNDRIP provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

There is considerable disagreement in the international legal community and in Canada as to the legal and practical effect of UNDRIP; with many viewing it as an aspirational document only, with no legal binding effect unless it has been expressly incorporated into domestic law. Other experts, including James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, argue that UNDRIP has already become part of customary international law and accepted as law in general practice.

UNDRIP was initially opposed at the United Nations by only four member states; namely Canada, Australia, New Zealand and the United States, each having large, non-Indigenous immigrant majorities, small remnant Indigenous Populations and significant resource industries. All four opposing countries have since moved to endorse UNDRIP in some way, with Canada finally endorsing UNDRIP in 2016 without qualification, and committing to its full and effective implementation.

Indigenous leaders have consistently called for adoption of UNDRIP by Canadian governments, which sentiment was strongly reflected in the recommendations of the Truth and Reconciliation Commission of Canada ("**TRC**") (see for example, Calls to Action #43 through to #50). In addition, Call to Action #92 urges the corporate sector to adopt UNDRIP as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities

involving Indigenous Peoples, Traditional Lands and the resources therein, including a commitment to obtaining FPIC of Indigenous Peoples before proceeding with economic development projects.

The Canadian government has sought to implement the recommendations of the TRC on a number of fronts, including with the introduction of Bill C -15. Bill C-15 requires the Canadian government to "take all measures necessary to ensure the laws of Canada are consistent with" UNDRIP and further, to prepare and implement an action plan to achieve the objectives of UNDRIP within 3 years. As indicated above, it is not clear yet what the actual effect of Bill C-15, if passed, will be on the laws of Canada however, it is safe to say that the objectives of UNDRIP are being advanced simply by the process of bringing Bill C-15 into law.

More importantly, from a practical perspective, is the realization that UNDRIP has already had a discernable impact on the expectations of Indigenous communities across Canada. The principles articulated in UNDRIP reflect the worldview of Canada's Indigenous Peoples and drives their expectations for a fundamental respect for their Traditional Lands, and meaningful involvement in resource development and environmental stewardship. The failure of a resource developer to align with the Indigenous communities in the areas in which it operates translates into increased project risk (i.e., uncertainty over regulatory and environmental approval, legal challenges based on inadequate consultation, etc.) and real business costs (e.g., increased financing costs, lost productivity, discounted valuations, indirect costs relating to conflict management, etc.).

Indigenous Community Equity Participation

In our experience, Indigenous communities, and in particular the tribal elders that influence traditional decision making, are not opposed to resource development on their Traditional Lands; only to resource development in respect of which they do not equitably participate, or that is not sufficiently protective of their rights and interests or their value of environmental stewardship. Traditional Indigenous governance models encourage leaders to base their decisions on whether they would benefit their communities for generations into the future; including embracing development provided it is conducted in a responsible and sustainable manner that respects Traditional Lands and with demonstrable benefit being returned to the community.

Notwithstanding the lack of a Canadian domestic law requirement to obtain FPIC, a number of affected Indigenous communities have found innovative ways to participate in and take advantage of resource development opportunities on their Traditional Lands. Such communities have successfully negotiated involvement in employment, procurement, training, community infrastructure, revenue sharing, co-management, joint ventures, and other forms of economic participation. Commercial relationships that provide impacted Indigenous communities with meaningful economic participation in resource developments on their Traditional Lands utilize a combination of three general categories of benefit:

- a share of the passive resource revenues generated by the resource development either as a royalty share of the resource developer's commercial interest, or as a share of the Crown tenure bonus payment, resource production royalties and periodic rental payments;

- contractual preferences for training and employment opportunities for community members, and procurement opportunities for community and member–owned businesses; and
- a direct equity participation or active working interest in the resource development itself.

Creating fiscal certainty without putting the current or future assets of the community at risk is often a priority for the leadership of the impacted Indigenous community. This risk-free fiscal certainty can be achieved through passive resource revenues and therefore, it is often one of the first requests made by an impacted Indigenous government when a resource developer initiates its consultation process. Indigenous governments are also often under political pressure to secure contractual preferences for employment and business opportunities, as these translate into immediate benefits for individual members and member-owned businesses.

While elements of these two categories of revenue may invariably need to be included in packaging the commercial interest, in our view, neither represent true FPIC but rather an opportunistic acquiescence on the part of the impacted Indigenous community to a resource development that will inevitably proceed. It is important to make a clear distinction between commercial arrangements that provide categories of passive resource revenues and contractual preferences to the impacted Indigenous community, and commercial arrangements that provide an active equity participation interest in the resource development itself. The former provides very little in the way of capacity building for the Indigenous community, does not invite input by the community into the nature, extent and pace of resource development, does not deliver any great understanding or insight into the resource development itself, and in our view, does not fully meet the needs of alignment and FPIC.

Providing an active equity participation interest to impacted Indigenous communities can be a key element in obtaining informed consent and in reaching the degree of alignment necessary for the permitting of resource developments to proceed on predictable timelines, and for the requisite social license from those communities for operations to be conducted over the long-term without disruption. Equity participation also provides impacted Indigenous communities with a voice in decision-making, aligns their interests with those of the resource developer, increases self-reliance by providing a line of sight to meaningful own source revenues, wealth creation and financial sovereignty, and ensures that both the developer and the community share in the costs, benefits and risks of resource development activities on Traditional Lands.

Finally, the potentially meaningful wealth creation associated with equity participation provides the impacted Indigenous community with an avenue for financial sovereignty as these own-source revenues are outside of Canadian government control and are available for discretionary use at the community level to improve housing, health and education outcomes, provide social services, and stimulate their local economy.