RECONCILIATION TIME

With dozens of large projects hanging in the balance and legal precedents in their favour, Aboriginal groups now have the leverage to resolve land claims and other issues. Direct, good-faith negotiations can help avoid lengthy regulatory and court battles

BY BRIAN BURTON

ACROSS CANADA, the long neglect of Aboriginal issues is now confounding the nation's economic development as never before.

From Plan Nord in Québec and the Ring of Fire in Ontario, to the oil sands in Alberta, liquefied natural gas (LNG) and hydro in British Columbia and pipelines coast to coast, big projects and legal precedents have given Aboriginal groups the leverage to insist on resolving land claims and other issues that have festered for generations.

In its November 2015 report, *Economic Development in Jeopardy?* the business-focused Fraser Institute notes that, in British Columbia, overlapping Aboriginal land claims account for more than 100 per cent of the territory of the province. Fraser says the recent *Stellat'en First Nation v. Rio Tinto* decision, enabling legal actions against private parties for damages on Aboriginal title claims, "has the potential to create an environment of heightened uncertainty for all existing and future economic development projects. ..."

Lawyers with extensive expertise in the field say industry should continue to drive consultations and press forward into commercial deal-making for individual projects. Direct, good-faith negotiations between industry and Aboriginal groups, they say, can frequently avoid protracted regulatory and court battles. But those same experts insist that federal and provincial governments have an inescapable constitutional duty to become fully engaged in negotiations, both for individual projects and in finding the way to a broader Canadian reconciliation with indigenous peoples.

"This is becoming a serious situation for our nation as a whole and it directly affects the functioning of the economy," says Heather Treacy, with the Calgary office of DLA Piper (Canada) LLP. "We're really at a juncture where, if we want continued economic prosperity in Canada, we need to address

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To be sure, there's a long history of industry leading consultation and accommodation with Aboriginal groups — a history that actually predates many important court decisions in the area. After all, proponents are the ones who understand projects in detail. Based on that notion, governments across the country have been directing companies to communicate and consult with local communities, both native and non-native, for several decades as part of the project permitting process.

Now, with dozens of projects hanging in the balance, companies are increasingly entering into direct negotiations with Aboriginal communities to work out detailed impact benefits agreements (IBAs) aimed at securing contractual, long-term indigenous support for developments.

"Time is money," says Tracy Pratt, with Fasken Martineau DuMoulin LLP in Toronto. Direct negotiation of an IBA can streamline regulatory approvals by documenting consultation, accommodation and project support.

Pratt says First Nations in BC have more experience in IBA negotiations but over the past several years, IBAs have increasingly been used in Ontario. "In cases where First Nations lack capacity to develop a project or create a supply or service business on their own, we're starting to see the use of joint ventures, limited partnerships or other corporate structures." She says these arrangements may provide equity interest, a source of revenue or training, employment and capacity building.

Besides clearing regulatory hurdles, benefits to companies can include securing local workforce support in remote communities. For non-Aboriginal service and supply companies, "formal collaboration with the IBA community" can also improve their bids on IBA projects, Pratt says.

"This type of capacity building is in its infancy in Ontario but it's where, going forward, there's room for innovation," Pratt says. "Where it's still a bit tricky is in the earliest stages of mining projects."

THE PROBLEM LIES in the discrepancy between rising expectations of First Nations and the small scale and uncertain nature of early-stage exploration, she says. While Aboriginal groups may be impatient for opportunity, mining companies see core drilling and other early-stage exploration as low-impact activities with only a modest chance of subsequent development. At this stage, Pratt says, there are few employment and business opportunities. Moreover, exploration generates no revenue and investors want to see their money "going into the ground."

Alternatively, the Aboriginal community may be strongly averse to seeing its hunting seasons, medicinal plants or burial sites disturbed by a mining company or its contractor seeking to conduct exploration drilling. But Pratt says "the vast majority of early-stage exploration can address such concerns easily, once potentially adverse impacts are clearly identified." It's worth a company's best efforts to commit the necessary time, energy and personnel toward building a solid rapport.

"It's all about dialogue and building the relationship," she says. "It's safe to say that, at this stage, no mine will be constructed in Ontario without IBAs with adversely affected Aboriginal communities. The more difficult question for a proponent – given the increasing challenge of overlapping traditional territories and conflicting claims – is with which Aboriginal community to negotiate an IBA. It's a fundamental issue facing developers and First Nations in Ontario and elsewhere."

Treacy says the starting point for a commercial agreement has to be "a realization that consultation is not a short-term, quick process but rather the building of a long-term relationship [and] a recognition that the values of the Aboriginal community may not always accord with those of the [larger] society." She adds that, from long experience, indigenous peoples are very skilled at assessing the sincerity of their counterparties in negotiations.

She says successful IBAs are likely to include company commitments to: a frame-

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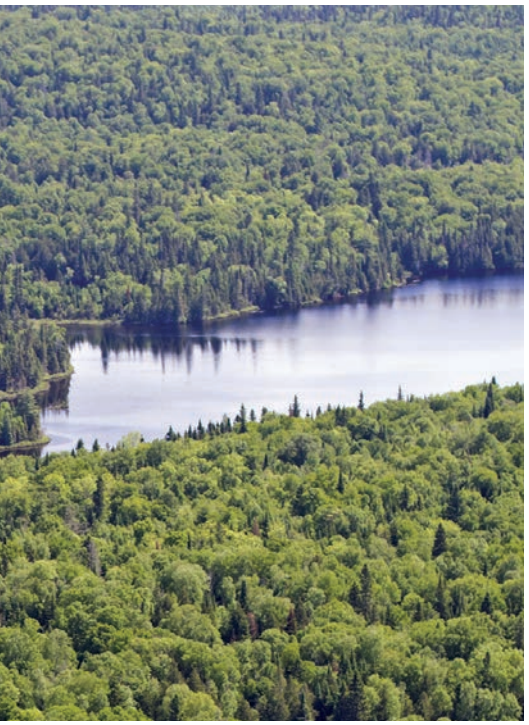

work for ongoing communications and partnership over the life of the project; training and employment; and contracting opportunities or revenue sharing, "where appropriate."

In return, Treacy says, the project proponent receives clear support and sign-off on project details by the local Aboriginal community. But all experts stress that every indigenous group has its own priorities and, where IBAs are concerned, no one size fits all. A single project may entail separate negotiations with each of two or more Aboriginal groups and Treacy says that, in her experience, a lack of understanding of differences among Aboriginal communities is one of three frequent contributors when negotiations fail. The other two are beginning consultations too late in the development process and a lack of trust, respect and ongoing communications.

"In other words," she says, "hurried, one-off consultations do not work."

Tom Isaac, with Osler, Hoskin & Harcourt LLP in Calgary, says companies have to know the business case for their project in reasonable detail before they contemplate negotiating an IBA. And, he adds, there's no standard-form contract. "There's no cookie-cutter approach. Companies want to know, 'What's the market rate for an IBA?' There isn't one. What makes a good deal for one company or one Aboriginal group may not work for another company or another Aboriginal group."

Isaac adds that companies have to understand that in negotiations with First Nations "there's not necessarily a willing buyer and a willing seller." Aboriginal priorities may not include a major mining project or pipeline. "You could be talking a different language," which he says will require a company to take a step back, be patient and seek creative solutions.

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> DLA PIPER (CANADA) LLP

THERE'S ALSO the emerging issue that both companies and First Nations have traditionally preferred to keep financial terms confidential. But confidentiality may soon be swept aside by the new *Extractive Sector Transparency Measures Act*, aimed at supporting international anti-corruption efforts. The Act requires energy and mining companies to disclose all payments to governments exceeding $100,000 per year in any one of seven categories, and this will include First Nations governments as of June 1, 2017.

Isaac says that in future this could lead to public disclosure of agreement terms that would previously have been confidential — potentially making negotiations more difficult, rather than less so, and likely more expensive. And he wonders whether Ottawa has dual objectives in extending the Act to cover First Nations. "What's the purpose of disclosure?" he asks. "Is it anti-corruption or is it guiding the market?"

Nadir André, a partner with Borden Ladner Gervais LLP in Montréal and himself a member of the Schefferville, Que., Innu community, says freedom of contract may provide Aboriginal groups and companies a partial solution to the current logjam between Ottawa, the provinces and First Nations. André advises his Aboriginal clients that taking a project developer to court should be a last resort in the effort to ensure access to economic opportunity.

"I tell clients, it's like you take a quarter and you flip it. You win or you lose." Far better, he says, to negotiate for mutual benefit. Beginning in 2010, the Innu of Schefferville intermittently blockaded four iron mines and have since negotiated IBAs with all but one.

André cautions companies that, to be successful, deals must be adapted to Aboriginal realities and this takes considerable forethought. He cites the Innu agreement with Tata Steel as a leading example. In addition to training, employment and contracting opportunities, as well as financial participation in the mine, he says, the Innu secured agreement that all project foremen would be bilingual, to accommodate the fact that the second language of the native community is French, not English. In counterbalance, Aboriginal workers were required to learn some basic English.

To maintain a focus on living up to training and employment commitments, André says, the company agreed to hire two training and employment coordinators — one

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for the company and an opposite number for the Aboriginal community.

The company has also instated cultural sensitivity training for fly-in workers from the south. "When the majority of the people are Aboriginal, you're coming to their home and you have to respect them," André observes. He says the company has backed up its policy, and in a couple of serious cases, workers have been dismissed.

As another example of cultural challenges, he says, hunting seasons are a major part of Aboriginal life that simply must be accommodated. "If we're 40 per cent of the workforce, we're not all going to take our holidays at the same time. But the Aboriginal employee will go hunting — with or without permission."

In an isolated community, such as Schefferville, André explains, most jobs are seasonal and chronic unemployment is concentrated in the indigenous population. "The notion of full-time employment does not exist. The value of work does not have the same meaning and it has to be acquired. People are getting used to it, but it takes time." He says these are some of the reasons the mine has a formal second-chance training program that coaches native employees on the norms of the work world.

He notes that the recently signed Labrador Inuit Treaty with the government of Newfoundland makes IBAs mandatory for all major projects. "If every province would do that, it would change the face of the country," he says.

UNDERLYING ALL negotiations between industry and First Nations is the concept that, as the name implies, indigenous peoples were here first and retain certain rights. In Canada, the legal foundations of Aboriginal rights and Aboriginal title reach back 250 years and are reinforced by countless court decisions since then.

Consistent with British colonial policy of the day, the Royal Proclamation of 1763 secured ancestral lands of the original inhabitants of British North America that had not been specifically ceded to or purchased by the Crown.

In 1982 the *Constitution Act* affirmed Aboriginal and treaty rights. In *R. v. Sparrow* in 1990, the Supreme Court of Canada said the Crown's fiduciary duty to Aboriginal peoples can never be adversarial, specified the duty to consult and set out a test for justified infringement on Aboriginal rights. In 1997, *Delgamuukw v. British Columbia* saw the Supreme Court rule that Aboriginal title is protected by the *Constitution Act* and includes the economic value of land. The court said reconciliation should be the objective of all consultations.

In *Haida Nation v. British Columbia*, the Supreme Court said in 2004 that the duty to consult is grounded in the honour of the Crown and that duty is engaged regardless of whether title has been proven. In the 2014 *Tsilhqot'in* decision, the Supreme Court recognized Aboriginal title to a specific land claim for the first time. The court further said that infringements will be judged on how they serve reconciliation between Aboriginal groups and the general public.

Taken together, legal experts read all this, and dozens of other decisions, to say there's no getting around the duty of project proponents and the Crown, both federal and provincial, to consult, accommodate and seek genuine reconciliation before proceeding with any development on land subject to treaty or land claim, proven or pending. "Project proponents have a meaningful role to play, but the duty to consult ultimately rests with the honour of the Crown," Pratt says.

From Ontario to Alberta and the Yukon, excluding most of BC, major resource plays inescapably rest on treaty lands that were long ago surrendered to the Crown in return for certain perpetual rights and benefits. Pratt points out, however, that treaty-holding First Nations retain hunting, fishing and trapping rights on these traditional lands and frequently feel a strong sense of connection to, and ownership of, ceded territories. Companies dismiss this affinity at their peril.

"Showing up and saying, 'Legally, that's not correct,' really doesn't advance things," she says. An approach by a developer that's perceived as hardline or confrontational can provoke anything from more difficult negotiations to regulatory delays, court fights or even blockades.

Moreover, the *Tsilhqot'in* decision illuminates a sharp divide between First Nations who accepted relatively paltry treaty awards 100 years ago and those, like the Tsilhqot'in, who have pursued far-reaching Aboriginal title claims into the 21st-century legal arena.

"Just on the face of it, there's a massive discrepancy between treaty rights and the benefits of Aboriginal title," Pratt says. In light of *Tsilhqot'in*, she says, a local First Nation may harbour plans for a court challenge to their treaty and a subsequent claim of Aboriginal title. A treaty challenge alone could take a decade or more to find its way to the Supreme Court of Canada — making a separate IBA vastly preferable for any company seeking to launch a project.

Underscoring this concern, Treaty 9 Matawa First Nations leaders have made several public statements strongly suggesting their intent to pursue Aboriginal title on treaty lands covering the entirety of the Ring of Fire, with its $60-billion mineral deposit estimate.

In *Wabauskang First Nation v. Minister of Northern Development and Mines et al.*, Pratt says, the Ontario Divisional Court upheld the right of the provincial government to license infringement on Aboriginal land. Pratt says the *Wabauskang* outcome makes clear that if First Nations under Treaty 3 or any of the similarly worded treaties (Treaties 1-11) want to assert rights to resources and revenue sharing, they'll have to challenge their treaties and seek Aboriginal title through litigation in the courts. "This has been a topic of considerable discussion with the Ontario government in the context of the Ring of Fire development," she adds.

"If anyone successfully challenges a treaty, of course, that changes everything," Pratt observes.

"Many Aboriginal groups are of the view that the treaties themselves are not valid," Treacy says. And while Ottawa and the provinces insist the treaties are binding, it remains to be seen how the courts will rule on these issues.

André notes that, leaving aside treaty challenges, 20 per cent of Canada, or a total area the size of Mexico, remains open to Aboriginal title claims. He says the possibility of successful Aboriginal title claims may give First Nations leverage to seek a compromise in the form of shared-royalty agreements with provincial governments and he's heard one or two provinces may be examining this as an alternative to fighting land claims in court.

SHORT OF TREATY challenges, there's also the question of the adequacy of consultation with Aboriginal communities.

"Industry clearly needs to engage and consult with Aboriginal communities and drive deals forward," Treacy says. But "it's imperative that government be engaged. If the government does not consult and engage at the appropriate time, then the entire deal will be subject to challenge by the Aboriginal community on the basis that the government did not fulfill its consultation obligations — and the entire project will be at peril." She observes that various First Nations have decried the tendency of governments to allow their constitutional duty to consult to be fulfilled by companies and regulators, and that she expects the issue to go all the way to the Supreme Court of Canada "soon."

"All players [industry, Aboriginal groups and governments] need to be fully engaged and government needs to demonstrate strong leadership to provide guidelines that all parties can rely on," Treacy argues. "Government cannot drop in and out of the process."

David Bursey of Bennett Jones LLP in Vancouver says there's an increasing tendency to push the responsibility for consultation and accommodation onto the private sector. But he says the result is a lack of coherence and equity that requires a policy response. He says *Haida Nation v. British Columbia* makes clear that the duty to consult is grounded in the honour of the Crown. The duty to consult, therefore, rests inescapably with government and can't be entirely offloaded to the private sector.

Bursey says the lack of consistent government involvement raises huge questions of equity. "Companies have varying abilities to accommodate and Aboriginal groups have different powers to negotiate. The discrepancies are becoming a lot clearer with big LNG [regulatory] proceedings," he says. "This private accommodation system that's emerging is creating some really serious problems that will only get worse."

Isaac says "there's lots of focus on what industry must do — but it's coming from trying not to point the finger at government." He says there's a "constitutional imperative" over every deal that demands government involvement. Beyond the requirement for government to consult on each infringement that takes place on Aboriginal land, he says, there's a need for a policy framework within which to negotiate successful agreements.

"You can't just put it back onto industry," he says. "A company should look after its own business interests. It should not be charged with the mantle of deciding, 'Is this good for the economy of Canada?' A company shouldn't have to be worrying about that stuff.

"There is a critical role for government to play in all of this," he says. "The iceberg is how is all of this going to work? Some Aboriginal groups get resource sharing and others get nothing. Well, is that equitable? And the answer is, let's not talk about it.

"We need to answer the bigger question," Isaac says. "How do Aboriginal peoples fit into the fabric of Canada — in their own unique way?"

In its 1997 *Delgamuukw v. British Columbia* ruling, André notes, the Supreme Court first called for "true reconciliation" of Aboriginal and non-Aboriginal rights. "Reconciliation is the key," he says. "The Supreme Court is always asking for some type of reconciliation."

Treacy says the courts must take cases as they come and they're largely confined to ruling on specific issues. "Courts do try to set down overriding principles, but if you read between the lines, you can see pleas for reconciliation," she says.

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