The Duty to Consult and mineral exploration—complexities across Canada

BY LESLEY WILLIAMS

In September 2015, the PDAC convened 10 regional industry associations from across Canada to discuss a key priority for the mineral exploration industry—the Duty to Consult. The purpose of the gathering was to provide an opportunity for participants to share information, discuss the strengths and weaknesses of the consultation framework in their region, and exchange ideas to continue to support their members and help inform advocacy efforts on this issue.

Many industry practitioners are familiar with the principles of the Duty to Consult, an obligation of the Crown established in the 2004 *Haida Nation v. British Columbia* decision by the Supreme Court of Canada (SCC) with further guidance provided in subsequent case law. It is generally understood that: the Crown is ultimately responsible for consulting with Aboriginal communities; the Duty to Consult requires an understanding of the nature of Aboriginal and treaty rights at stake, as well as an assessment of the degree of impact a Crown decision will have on those rights; and, the procedural aspects of consultation can be delegated to proponents. Furthermore, where potential impacts are identified, the consultation process should determine the appropriate accommodation measures.

The *Haida* decision also encouraged the development of regulatory schemes by provincial and territorial governments that would help guide consultation. In response, most jurisdictions have produced public consultation policies, frameworks and/or guidelines to govern consultation processes. There are some general elements that are common to all jurisdictions, including: objectives and legal framework; expectations for proponent engagement to share project-related information and discuss impacts; identification of accommodation measures; and, participation by Aboriginal communities.

The invitation by the court to develop consultation frameworks has led to a patchwork of jurisdiction-specific consultation policies and guidelines that vary in a number of ways in terms of their content and application. Some of the main differences include: the nature and extent of the Crown's involvement in the consultation process and, by extension, the responsibility placed on proponents; timelines for consultation; and the responsibility for financial costs associated with consultation and accommodation.

While policy and practice differ across jurisdictions, PDAC outreach efforts have identified the following common areas of concern related to Crown consultation processes.

THE DETERMINATION OF THE TRIGGER, SCOPE AND NATURE OF CONSULTATION

Many jurisdictions in Canada lack a clear, transparent (public), systematic consultation framework—a graduated approach to consultation that incorporates an objective, consistent, proportional and transparent assessment of the potential for exploration activities to infringe Aboriginal or treaty rights, and which identifies the accommodation measures necessary to avoid or mitigate such infringement.

This can lead to disproportionate consultation for exploration activities, or consultation that expands beyond the focus on rights and potential impacts to rights. The consultation policies of Saskatchewan and Alberta, on the other hand, make explicit references to the Crown's role in conducting assessments to help determine whether consultation is required, and if so, the scope of consultation required.

IDENTIFICATION OF POTENTIALLY IMPACTED COMMUNITIES

The identification of communities that might be impacted by a mineral project generates a number of challenges. The identification of potentially impacted communities for Crown consultation and community engagement is often too broad, inconsistent between different levels of government, too fluid (numerous changes can occur mid-project), and is not transparently, if at all, linked to the nature of asserted rights. These issues have implications for project timelines, costs, shared territories and a flawed consultation process. Given its relationship with Aboriginal Peoples and knowledge of Aboriginal rights, the Crown is best positioned to assess which communities are to be consulted.

ROLES AND RESPONSIBILITIES—DELEGATION TO PROPONENTS

In a number of jurisdictions the responsibility for, and various parties' roles in, formal consultation (as outlined by the SCC) is ambiguous, uncertain and/or inconsistent. Courts have indicated that proponents can be delegated "procedural" aspects of consultation, but it is unclear as to what this entails. In Ontario, as well as Newfoundland and Labrador, it can be argued that proponents are being delegated substantive elements of the duty to consult, in some cases with little support on key elements of the consultation process such as strength of claim analysis and costs. In jurisdictions where

the Crown has indicated that it will undertake formal consultation, the Crown is often not adequately resourced to do so and proponents are unsure of their role, if any, in the process. British Columbia and Manitoba have indicated that the Crown will not delegate consultation but will outline expectations for a separate community engagement process for proponents. This can contribute to the conflation of legal Crown consultation and voluntary, proponent-led community-engagement activities as it is often unclear how the two processes are distinct. The absence of a publicly-available policy in Yukon contributes to the ambiguity of consultation and confusion for proponents operating in the region.

RESPONSIBILITY FOR THE COSTS OF CONSULTATION

The duration and frequency of consultation can be quite costly and onerous, particularly for junior exploration companies. The question of "who pays" for consultation is frequently raised across Canada, particularly as there is no existing case law that indicates whether the Crown or proponents are responsible for these costs. Ontario's consultation policy places the responsibility on proponents to fund consultation efforts with Aboriginal communities; there are similar expectations in the Northwest Territories. In British Columbia, where consultation is not delegated yet engagement by proponents is encouraged, it is noted that the Crown will fund Crown consultation and that proponents are responsible for engagement-related costs.

ADHERING TO TIMELINES FOR CONSULTATION AND DECISION-MAKING

Most jurisdictions have included in their policies or regulatory frameworks timelines for consultation activities (such as notification, Aboriginal community responses, and Crown decisions), as well as certain flexibility to allow for further consultation, if deemed necessary. The Northwest Territories, Manitoba and Ontario, for instance, have mechanisms whereby the clock can be stopped and the permitting process put on hold. While it is understood that consultation is a process and that the extent of consultation may change should new or additional information arise, there is an apparent lack of transparency or clarity with regards to what stops the clock, how the decision is made and by whom, and if it is applied consistently. Clear, predictable and consistent timelines are critical for exploration and development projects.

ASSESSING THE ADEQUACY OF CONSULTATION

It is often unclear to proponents when and how consultation is deemed adequate. The factors considered by the Crown when determining consultation adequacy—whether it is carried out by the Crown or delegated to proponents—are not made explicit in jurisdiction-specific consultation policies and guidelines. In instances where the proponent has been delegated a bulk of the consultation activities, it is especially difficult to achieve a level of certainty or predictability for an exploration project as the question of adequacy is discretionary, open to interpretation by the Crown and legal challenges. There is also a risk that, in the absence of transparent criteria for determining consultation adequacy, commercial agreements between companies and communities are being used by the Crown as a benchmark for consultation adequacy (rather than the consultation record of the Crown and/or proponent).

ACCOMMODATION AMBIGUITY AND THE BLURRING OF ACCOMMODATION MEASURES LINKED TO IMPACTS ON RIGHTS AND COMMERCIAL, COMPANY-COMMUNITY AGREEMENTS

The definition and practice of accommodating impacts to Aboriginal and treaty rights is ambiguous in jurisdictions across Canada, particularly in relation to mineral exploration projects. There is a lack of guidance for accommodation as it pertains to establishing when it is required, who is responsible, and what form is adequate (e.g. mitigation vs. compensation). Linked to this ambiguity is the increasing lack of distinction between formal accommodation measures (resulting from consultation) and commercial, company-community agreements (resulting from engagement). In Ontario's consultation policy, for instance, companies are encouraged to reach arrangements with Aboriginal communities whereas Newfoundland and Labrador's policy explicitly states that proponents are responsible for any financial accommodation related to the infringement of rights. Conversely, as Saskatchewan does not delegate consultation, it distinguishes between socio-economic agreements and accommodation.

Despite efforts by provincial and territorial governments to delineate consultation processes and, in some cases, provide guidance for proponents on their role in consultation and engagement, challenges exist in practice. This results in delayed projects, increased costs, investor uncertainty and negative impacts to company and community relationships. c

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Despite the complexities related to the Duty to Consult, proponents across Canada continue to make efforts to manoeuvre the challenges and build positive, trusting relationships with project-affected Aboriginal communities. For additional guidance for leading practices in community engagement, visit www.pdac.ca/e3Plus to view PDAC's new community engagement guide for explorers.

Representatives from regional industry associations and the PDAC meet to discuss the Duty to Consult and mineral exploration in September 2015.