



## 20. Indigenous Law

### Introduction

Indigenous peoples in Canada (First Nations, Inuit, and Métis) have Aboriginal rights (including treaty rights) that may include Aboriginal title over significant areas of land. These rights must be taken into account when an enterprise is developing or financing a natural resource, a mining, an energy, or a real estate project or any other project that requires government permits or approvals. The government has a duty to consult and, if appropriate, accommodate Indigenous peoples to avoid or mitigate any impacts a proposed activity may have on treaty or Aboriginal rights and title. The government may delegate some of these obligations to industry, and, in practice, this is often the case. As a result, in Canada, appropriate engagement with Indigenous peoples is fundamental to successfully moving any major project or transaction forward and ensuring the continued viability of existing facilities and operations. Often, the right engagement strategy (and its diligent implementation) can mean the difference between success and failure.

The landscape has shifted significantly over the past few years, with major developments in case law and, more recently, government policy.

### Aboriginal and Treaty Rights of Indigenous Peoples

The Aboriginal and treaty rights of Indigenous peoples in Canada are protected under Section 35 of the *Canadian Constitution Act*, 1982 (Section 35). Section 35 protects remaining Aboriginal title to certain lands in Canada, Aboriginal rights to use lands for certain traditional purposes (such as hunting, fishing, or trapping), and rights conferred on Indigenous peoples under historical and modern treaties (Section 35, “Rights”).

### Duty of Consultation and Accommodation

In order to reconcile Section 35 Rights with the sovereignty of the Crown, the federal and provincial governments (“Crown”) have a constitutional duty to consult Indigenous peoples if the Crown is contemplating conduct that may have an adverse effect on their Section 35 Rights.

Examples of Crown conduct that can trigger the duty to consult include decisions to grant surface tenures over public lands, the issuance of new permits or the modification of existing permits (such as environmental or impact assessment certificates), decisions approving the transfer of permits (e.g., in the course of an acquisition), and many others.

The threshold to trigger the Crown's duty to consult is low – it arises when the Crown has knowledge (real or constructive) of the potential existence of Aboriginal rights or title and is contemplating conduct that may adversely affect such rights or title. The duty exists prior to the actual proof of rights or title and even with very minimal evidence of potential harm.

Once triggered, the content of the duty (i.e., what the Crown must do to fulfill it) varies from case to case. At the low end of the spectrum, only the notice and sharing of project-related information may be required. At the high end of the spectrum (where there is a strong case supporting the existence of the Aboriginal rights or title and the potential for an adverse effect is serious), the duty to consult may necessitate concrete measures that mitigate or compensate for the adverse impacts, referred to as accommodation and possibly including alterations to the project and/or revenue sharing on the part of the Crown).

## Negotiation

The Crown may delegate procedural aspects of consultation to companies and other proponents, but there is no requirement to obtain consent on lands where Aboriginal title has not yet been established through a judicial declaration or a treaty. Recent changes are moving toward regulatory structures that give more weight to consent, and many companies already seek to obtain consent with respect to projects and operations that affect lands subject to Aboriginal rights and title claims. In some jurisdictions, primarily in northern Canada, proponents of major development projects are required to negotiate an impact benefit agreement with potentially affected Indigenous peoples under concluded land claims agreements or legislation governing resource development. Federal and provincial permitting authorities are moving toward giving increasing weight to consent (but stopping short of requiring it or close to it) and at least the requirement to seek to obtain consent where Aboriginal title might be affected.

Regardless of the Crown's approach, by consulting with Indigenous peoples and attempting to address as many of their concerns as possible, proponents have been able to avoid or limit potential opposition to projects and operations and the negative consequences that can result from a lack of communication and engagement with Indigenous peoples, such as challenges to a government decision to issue a permit or licence based on inadequate consultation.

## 1. Recent Developments

### (a) United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) describes the rights of Indigenous peoples around the world and offers guidance on co-operative relationships with Indigenous peoples based on the principles of equality, partnership, good faith, and mutual respect.

An important aspect of UNDRIP is that of free, prior, and informed consent (FPIC), which, among other things, requires the government to consult and co-operate in good faith with the goal of obtaining the free, prior, and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them and before approving any project affecting their lands, territories, or other resources. (In situations of extreme impacts, such as relocation or the storage or disposal of hazardous substances, actually obtaining FPIC may be required.)

The federal government has stated its full support of UNDRIP, and some provinces in Canada have done the same.

Bill C-262 (currently before the Senate) would require the federal government to take measures to ensure that the laws of Canada are consistent with UNDRIP and to develop and implement a national action plan to achieve the objectives of UNDRIP. The specific requirements of these measures are not yet known.

### (b) Truth and Reconciliation Commission

In 2014, the Truth and Reconciliation Commission of Canada (TRC) recommended 94 calls to action in order to redress the legacy of residential schools and advance the process of Canadian reconciliation. These recommendations include requirements that industry use UNDRIP as a framework for reconciliation and seek FPIC and that the Crown adopt UNDRIP as a framework for reconciliation and adopt the process of seeking to obtain FPIC.

### (c) Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

In 2017, the federal government announced its 10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, which it states will be used to guide the government in its review of laws, policies, and practices. The 10 principles are:

1. The Government of Canada recognizes that all relations with indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
2. The Government of Canada recognizes that reconciliation is a fundamental purpose of Section 35 of the *Constitution Act*, 1982.

3. The Government of Canada recognizes that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
4. The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of co-operative federalism and distinct orders of government.
5. The Government of Canada recognizes that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions that impact them and their rights, including their lands, territories, and other resources.
7. The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of Section 35 rights must by law meet a high threshold of justification that includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
8. The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
9. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
10. The Government of Canada recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests, and circumstances of the First Nations, the Métis, and the Inuit are acknowledged, affirmed, and implemented.

(d) Recognition and Implementation of Rights Framework

In 2018, the federal government committed to the review of its laws, policies, and operational practices to ensure that the starting premise for all federal government action is the recognition of Section 35 Rights. As part of this commitment, the government announced the launch of a national engagement with Indigenous peoples to conduct consultations and ultimately table legislation on a Recognition and Implementation of Rights Framework ("Framework").

The government-stated purpose of the Framework is to ensure that the federal government recognizes, respects, and implements Section 35 Rights, including inherent and treaty rights, and provides mechanisms to support self-determination.

A draft overview of the Framework was released in the fall of 2018, and it remains to be seen what such a framework will look like when implemented, although its process seems to be delayed due to resistance from some Indigenous communities.

(e) Expanded Roles for Indigenous Peoples in Environmental Assessments and Other Legislation

In tandem with these developments, the federal government has also tabled draft legislation that proposes to replace the *Canadian Environmental Assessment Act*, 2012 with a new *Impact Assessment Act*. This draft legislation is aimed at broadening project reviews from current environmentally focused assessments to consideration of a wider range of effects, and it would require more consultation with Indigenous peoples throughout all stages of the impact assessment process. Related changes have been proposed to other legislation concerning the environment and project development. Some provinces have recently introduced legislation mirroring these federal changes.

## 2. Considerations for Doing Business in Canada

As a result of this evolving legal framework, Indigenous participation in transactions and projects is rapidly rising across all sectors of the Canadian economy. Proponents and operators are actively seeking agreements with Indigenous peoples to secure their consent and support for new projects and existing facilities that could potentially affect Section 35 Rights.

At the same time, Indigenous peoples are pursuing business alliances with the private sector to address infrastructure deficits within their communities, generate wealth, and create economic opportunities for future generations. This is resulting in Indigenous peoples taking more active roles in relation to development in their territories – from simply being consulted or employed on projects to being equity participants in operating businesses and industrial facilities. For equity participants, there has been an evolution from small equity stakes, or full ownership of small projects, to sophisticated partnerships or other commercial arrangements. It is anticipated that this trend will continue to grow in the coming years.