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LOST IN THE WOODS: NAVIGATING ABORIGINAL INTERESTS IN NATURAL RESOURCE DEVELOPMENT

A DISCUSSION PAPER

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April, 2014

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INTRODUCTION

This discussion paper aims to examine the implications of natural resource development in Canada with regard to Aboriginal communities, government agencies and corporate bodies. The first section will provide an historical background on how land in Canada has been organized as well as examine earlier modes of natural resource economies. Section two will examine noteworthy court cases in Canada and their implications on Aboriginal Title, Aboriginal Rights and the Duty to Consult and Accommodate with Aboriginal peoples. The final section will undertake more contemporary issues with respect to public-private partnerships and the integration of Aboriginal perspectives on environmental assessments. This paper is not intended to provide a comprehensive insight into the multitude of variables that will impact on development. Rather, it seeks to help develop an understanding of some of the common dynamics and considerations impacting development in this country in order to facilitate a critical conversation.

SECTION I: A HISTORICAL BACKGROUND ON LAND AND RESOURCES

Aboriginal-Government relations have largely been defined by a power imbalance that favours federal and provincial objectives. In 1951, Aboriginal people could legally pursue treaty and rights violations in the court system for the first time. After the Constitution Act of 1982, the obligation of the Crown to protect these rights becomes entrenched in law. Yet, despite these changes to the legal framework of Aboriginal-government relations there continues to be a reluctance or refusal to empower Aboriginal communities as real partners in terms of contributors of Indigenous Knowledge and as authorities in natural resource development.

The Fur Trade

The first major economic exchange over natural resources is a familiar one - the Fur Trade. It was the defining moment of both contact and economy between Aboriginal peoples and newly arriving settler peoples. The fur trade occurred began on the east coast of Canada during the 1500s and moved westward into the prairies until 1870. In the earlier stages of the fur trade both European settlers and Aboriginal peoples were benefiting from natural resource extraction. As demand increased in Europe for furs, the

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Hudson's Bay Company was established in Rupert's Land in 1670. Aboriginal hunters and trappers were employed in this region but it the Europeans that held positions of power and authority on the business end of HBC. During the 18th and 19th Century, the Métis nation is born from intermarriage between Aboriginal peoples and European traders. In 1869 without the consultation or consent of the Métis and other Aboriginal groups in the area, Rupert's Land is sold by HBC to Canada and the province of Manitoba is established in 1870. The fur trade serves as an example of corporate and state unilateral decision-making over natural resources and land title without the inclusion of Aboriginal peoples as primary stakeholders and more importantly, stewards of their homeland.

The Historic Numbered Treaties

The impetus for initiating the historical treaty process in Canada was twofold; firstly, the Royal Proclamation of 1763 mandated negotiation of "Indian land" with "Indians", and secondly, settling "Indian land" served the interests of the crown financially with regard to accessing natural resources.

The majority of treaties were made in the mid to late nineteenth century. It was through this process that the reserve system was first established. In most treaties, the Aboriginal people of that treaty area were put onto reserves but often with the caveat that they would have access to their entire traditional land base for hunting, fishing, etc. – or the natural resources of the time. This caveat would also serve as the basis for future court cases and land claim negotiations with regard to the loss of access and monies for activities such as mining, etc. in these traditional land bases by corporations, governments, etc.

The historical treaty process was designed to benefit the increasing number of European settlers and local, provincial and federal governments through increased access of natural resources and the land. Though Aboriginal peoples and communities were considered to be partners in this process, the interpretation and implementation of treaty clauses was largely one-sided and thus resulting resource extraction disproportionately favoured non-Aboriginal interests. The effects of this will be discussed in a later section.

The Indian Act was implemented in 1876, during the time of the historical treaty process. In 1951, many amendments were made to the Act, one of which included the right to file and land claim and to obtain legal counsel. The resulting effects of that time are still courses of action taken today by Aboriginal peoples and communities. They are: 1) taking government(s) to court, and/or 2) filing comprehensive or specific claims.

SECTION II – NOTEWORTHY COURT CASES

The Calder Decision, 1973

In 1973 James Calder and the Nisga'a First Nation (outside of Vancouver, BC) took the B.C. government to court citing that they had never ceded their traditional territory in any historical treaty. The British Columbia Superior Court dismissed this case, and Calder took the issue to the Supreme Court of Canada (SCC). Although the SCC did not rule in favour of the Nisga'a, three out of the seven court justices ruled that Aboriginal title did exist prior to contact and was not extinguished at the time of contact. This case is a landmark one because it became the basis for

defining Aboriginal Title, the B.C. Treaty Process, and the comprehensive claims process in Canada.

R vs. Sparrow, 1990

In 1984, Ronald Sparrow of Musqueam First Nation of B.C. was charged under the Fisheries Act for over-fishing. After losing his case in the County and B.C. Superior Courts, Sparrow took his case to the Supreme Court of Canada citing that he was exercising his Aboriginal rights under Section 35(1) of the Canadian Charter of Rights and Freedoms. Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The SCC ruled that Sparrow was exercising an "inherent" Aboriginal right to fish for cultural and ceremonial purposes. This right existed prior to the provincial Fisheries Act and was also protected by Section 35(1). Further, this case is significant because the SCC found that the word "existing" in section 35 must be "interpreted flexibly so as to permit their evolution over time". Therefore, "existing" was interpreted as referring to Aboriginal rights that were not "extinguished" prior to the 1982 Constitution.

The "Sparrow Test" also resulted from this ruling and exists in two parts. Firstly, to evaluate whether or not an Aboriginal right has been infringed upon, and secondly what might justify an infringement (Brackstone, 2002). It was decided that environmental and resource conservation would justify a legislative infringement. However, Sparrow's fishing net length did not pose a threat to conservation and so his Aboriginal right was upheld.

R vs. Van der Peet, 1994 & Delgamuukw vs. British Columbia, 1997

In 1984, the Wetsuweten and Gitskan First Nations take their case to the BC Superior Court and eventually to the SCC. They were staking ownership and legal jurisdiction to over 133 individual territories totaling approximately 58,000 square kilometers. This case is significant because the First Nations had to prove physical occupation of the land and its cultural/ceremonial significance prior to and at the time of European contact. This was the first time that oral history was accepted as evidence in the Supreme Court. The SCC declined to make a ruling on this land dispute and insisted that there should be another trial. The SCC did however recognize that in accordance with the Constitution Act of 1867, the Crown's "constitutional interest" was subject to Indian "constitutional interest" in the event that a treaty was not negotiated to settle Indian lands. As we know, there were no historical treaties negotiated on the mainland of B.C. (i.e. including Wesuweten and Gitskan territory). The significance of this case meant that Aboriginal peoples whose traditional lands had not been settled through treaty may still possess "Indian constitutional interest" of that land i.e. Aboriginal title (Brackstone, 2002).

In 1994, Dorothy Van der Peet took her case to the SCC. She was charged for intending to sell fish commercially. The court ruled that the Aboriginal right to fish for ceremonial purposes as identified in R vs. Sparrow does not extend to the right to sell it commercially. While bartering and trading salmon was part of the Stot:lo culture prior to European contact, the Court ruled that it was not distinctive part of the Stot:lo culture i.e. an Aboriginal right. Further, the court set a significant precedence in terms of ruling that an Aboriginal community must demonstrate that a practice, custom or tradition was integral to the distinctive culture of the Aboriginal group asserting the right.

This led to creation of the "Integral to a Distinctive Culture Test". The table* below summarizes these requirements.

	Van der Peet / Delgamuukw Tests
1	Take into account the perspective of Aboriginal peoples themselves (*VdP*)
2	Take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal people (*VdP*)
3	Identify precisely the nature of the claim being made (*VdP*)
4	Ensure that the practice, custom or tradition is of central significance (*VdP*)
5	Ensure that the right is of independent significance to the Aboriginal culture in which it exists (*VdP*)
6	Ensure that the cultural claim is distinctive to the Aboriginal culture, though it need not be distinct (*VdP*)
7	Ensure that the cultural claims are those of which have continuity with those that existed prior to contact (*VdP*); claimants must show continuity with present and pre-sovereignty occupation (*Del*)
8	Adjudicate claims on a specific basis (*VdP*)
9	Claimants must show exclusive occupancy, though shared exclusive occupancy may be considered (*Del*)
10	Ensure that the influence of European culture will only be relevant to the inquiry if it is demonstrated that the claim is only integral because of that influence (*VdP*)
11	Approach rules of evidence in light of evidentiary difficulties inherent in adjudicating Aboriginal claims (*VdP*)

* *Courtesy of Brian Thom (2005)*

R vs. Gladstone, 1994

In this case, two members from the Heiltsuk Band in British Columbia violated the Fisheries Act in the sale of fish. The band members took their case to the Supreme Court citing their Aboriginal right to sell fish should be protected under Section 35 of the Constitution Act. The judge found that this case differed from that of Van der Peet because the Heiltsuk traded fish beyond ceremonial and cultural purposes but rather in a matter that was essential to the Heiltsuk prior to European contact. The application of the Sparrow test for "extinguishment", the Aboriginal right was not extinguished at the time of contact yet the regulations of the Fisheries Act do show an intention to extinguish this specific Aboriginal right.

Further, in R vs. Sparrow, the right to fish was inherently limited based upon the internal needs of the community. In this case, because commercial fishing was the issue, it would only be limited by the external demand for it. The judge found that this claim did meet the Van der Peet test and that this right was being infringed upon by the Fisheries Act.

Haida Nation vs. British Columbia, 2004

In 1999, the B.C. government transferred a tree farming licence to Weyerhauser Co. on contested lands wherein the Haida Nation had previously claimed title and the right to harvest red cedar. The transfer of this licence was done without the consultation or consent of the Haida. Though title was not yet determined by the courts, the court ruled that the claims of Aboriginal title and rights of the Haida were strong. He also ruled that the duty to consult and accommodate rested with the Crown entirely and that this duty cannot be delegated to third parties. Further, this duty must be upheld even when title of lands and resources is still unclear as it could potentially have adverse effects on future decisions of Aboriginal title[1] and rights[2].

The Duty to Consult and Accommodate

What has emerged from the above court rulings is that the Crown has a constitutional duty to consult and accommodate Aboriginal peoples, communities, and organizations if Section 35(1) is compromised. Morellatto (2008) writes: "If government actions infringe potential or existing Aboriginal rights, if the infringement is not minimized and goes beyond what is required to achieve a valid legislative objective, and if fair compensation or other meaningful accommodation is not made, a subsequent court challenge could very well render a Crown decision, license or permit unconstitutional and invalid." Though the duty to accommodate is not explicitly defined in terms of standardized application, it is a matter that must be considered when undertaking natural resource extraction - the consequences of not considering it could be deemed unconstitutional.

In 2011, AADNC broadened the scope of the duty to consult and accommodate in their document, "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult." These guidelines state:

> The duty to consult is a constitutional duty; applies in the context of modern treaties; officials must look at treaty provisions first; and where treaty consultation provisions do not apply to a proposed activity, a "parallel" duty to consult exists. The Court has also clarified, that depending on their mandate, entities such as boards and tribunals may also play a role in fulfilling the duty to consult; that high level strategic decisions may now trigger the duty to consult; and, that the duty applies to current and future activities and not historical infringements (AANDC, 2011).

While this process has become more regulatory, the power still lies with the federal government in terms of determining the scope and depth of consultation. For example, some Aboriginal peoples may choose not to attend a consultation on a natural resource development issue because they believe the consultation process empowers state and corporate interests, as it promises no real partnership or benefits for Aboriginal peoples or communities in a real sense beyond voicing an opinion. Is choosing to abstain from a process really still consultation? This is where the duty to consult remains vague and contentious because the power lies with federal officials to dictate how information will be collected and utilized.

[1] Aboriginal title refers to the inherent Aboriginal right to land or a territory. The Canadian legal system recognizes Aboriginal title as a sui generis, or unique collective right to the use of and jurisdiction over a group's ancestral territories. This right is not granted from an external source but is a result of Aboriginal peoples' own occupation of and relationship with their home territories as well as their ongoing social structures and political and legal systems (Hanson, 2014). It is a right in the land itself - not just the right to hunt, fish and gather from it.

[2] Aboriginal rights refer to practices, traditions and customs that distinguish the unique culture of each First Nation and were practiced prior to European contact (AANDC, 2010).

Comprehensive and Specific Claims

In light of the complex nature of "recognizing and affirming" Aboriginal rights and title, and combined with many violations of the treaties, Aboriginal Affairs and Northern Development Canada has created comprehensive and specific land claims process.

Comprehensive land claims are defined as claims to Aboriginal title in "areas of Canada where Aboriginal land rights have not been dealt with by past treaties or through other legal means. In these areas, forward-looking modern treaties are negotiated between the Aboriginal group, Canada and the province or territory" (AANDC, 2010b).

AANDC also has a second claims process for those First Nations who operate under an historical treaty. Specific claims on the other hand deal with "past grievances of First Nations related to Canada's obligations under historic treaties or the way it managed First Nations' funds or other assets" (AANDC, 2010, Land Claims).

James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement

In 1975, the James Bay Cree and Inuit of northern Quebec struck a landmark agreement for shared authority, protection and benefits of traditional Cree territory that would be affected by the proposed hydroelectric project. The provincial government attempted to implement the project unilaterally two years earlier without any consultation or consent of the Aboriginal communities. Through an injunction, the James Bay Cree were successful at forcing a more equitable relationship over the natural resources of the area. The importance of the James Bay and Northern Quebec Agreement cannot be underestimated. It was the first time that Aboriginal rights and title were not only recognized by the federal and provincial governments, but legally specified in the first negotiated comprehensive land claim agreement in Canada.

Later in 1978, the Naskapi of Schefferville negotiated a similar agreement known as the Northeastern Quebec Agreement. They received less money under this agreement by choosing not to be a signatory on the JBNQA, but nevertheless eventually signed a parallel deal that would extinguish Aboriginal title and transfer specific Aboriginal rights in exchange for this title. There are three categories of lands in these two Agreements:

- ***Category I Lands***: Lands set aside exclusively for the Aboriginal communities that are signatories to the two agreements (14,000 square kilometres).
- ***Category II Lands:*** usually located around the villages, come under provincial jurisdiction. However, the Aboriginal people participate in the management of hunting, fishing and trapping and the development of outfitting operations. They also have exclusive hunting, fishing and trapping rights on these lands (150,000 square kilometres).
- ***Category III Lands:*** are Quebec public lands where Aboriginal and non- Aboriginal peoples may hunt and fish. However, Aboriginal people exercise certain rights on these lands under the agreements. They have exclusive rights to the harvesting of certain aquatic species and fur-bearing animals; they participate in the administration and development of the territory; and enjoy, until the year 2015, a right of refusal in the event of applications to set up or transfer new outfitting operations. The Aboriginal people must, however, relinquish this right for 30 percent of transfers or new outfitting operations proposed by non-Aboriginal people (1,000,000 square kilometres).

In terms of environmental protections and standards for these lands, the James Bay Advisory Committee on the Environment and the Kativik Environmental Advisory Committee have been established. As well, the Resource Access Negotiations Program is a government-funded program to assist Aboriginal communities in establishing businesses in the area of natural resources development (i.e. mining).

The Makivik Corporation is a birthright corporation of the JBNQA. Its mandate was to administer the funds of this Agreement. Since this time, Makivik is involved in negotiations of partnerships with both the private and public sector in the area of natural resource development (i.e. Hydro-Quebec, Raglan Nickel Mine). Makivik (2014) helps to contribute to infrastructure of Aboriginal communities in these regions through the investment and management of funds of these negotiated partnerships. Its corporate objectives are as follows:

- to receive, administer, distribute and invest the compensation money payable to Nunavik Inuit, as provided for in the James Bay and Northern Quebec Agreement;
- to relieve poverty, to promote the welfare, advancement, and education of the Inuit;
- to foster, promote, protect and assist in preserving the Inuit way of life, values and traditions;
- to exercise the functions vested in it by other Acts or the Agreement; and
- to develop and improve the Inuit communities and to improve their means of actions.

As of today, there are 93 land claims under negotiation in Canada. On average, they take about 16 – 20 years to reach the final stages of agreement (AANDC, 2010). Both types of claims have large natural resource management and royalty implications. They deal with past and present losses as well as future potential. This is where we saw the development of partnership-type relationships emerging for the first time in terms of natural resource co-management.

SECTION III: THE ERA OF PARTNERSHIPS

There is increasing focus on the creation and maintenance of partnerships involving Aboriginal communities, government and the private sector. Given the past lessons learned from not incorporating or respecting Aboriginal interests, it is in the best interests of all parties involved to design a partnership relationship. One of the most difficult aspects of partnerships is integrating sometimes-conflicting perspectives.

Stakeholders

- ***The Public:*** federal, provincial and municipal governments; First Nation band councils
- ***The Private:*** the private sector/corporate interests (on or off-reserve)
- ***The People:*** Aboriginal people on-reserve (traditional people, protesters/activists, etc.), local non-Aboriginal people
- ***The Land:*** usually considered to be the object of a development project rather than a subject, the land and the knowledge of the land is a vital stakeholder in potential outcomes.

Government Interests

In 1995, the federal government passed the Canadian Environmental Assessment Act (CEAA). The purpose of the Act is to promote sustainable development carried out on federal lands and to ensure that harmful environmental effects of projects do not affect jurisdictions outside of federal lands as well as on them. There is also a mandate to create opportunity for public participation in the environmental assessment process (CEAA, 2013). Unfortunately, this area is ill defined and there are no explicit statements on funding public participation in natural resource development projects.

The Environmental Assessment Agency developed a Sustainable Development Strategy which was a response to the Federal Sustainable Development Act passed in 2008. Aboriginal Affairs and Northern Development Canada

(AANDC) is responsible for reporting on their own departmental activities in four areas: 1) Air Quality; 2) Water Quality, 3) Protecting Nature, and; 4) Shrinking the Environmental Footprint. These guidelines and objectives call for responsible planning – so why is there still discord amongst Aboriginal peoples with regard to natural resource development?

Idle No More

Idle No More began in December 2012 as a response to Federal Omnibus Bill C-45 (Jobs and Growth Act). This Bill was very extensive and intersected many areas of social and economic areas. One of the main concerns of Aboriginal peoples and environmentally minded people alike was the directive to amend the Navigable Waters Protection Act. This Act is intended to protect navigable waters from the interference of pipelines, dams, etc. Proposed amendments to this Act would make it easier for industrial development and natural resource extraction to occur without the restrictions of environmental assessments.

The reaction to C-45 was seen both domestically and reached internationally. Opposition mounted from not just Aboriginal peoples, but concerned citizens everywhere. Because any proposed amendments would affect traditional lands and territories of Aboriginal peoples, there was widespread anger over the lack of consultation with Aboriginal peoples. The failure to uphold the duty to accommodate resulted in widespread protest. Beyond this fact, it is important to understand some of the philosophical underpinnings of Aboriginal identity and how this is impacted by natural resource development.

Environmental Assessments and Traditional Ecological Knowledge

> *"Although economic development is an important component of a sustainable community, it must not outweigh the environmental, social/cultural, and spiritual considerations" Jacobs (2002).*

Land and connection to land goes beyond the legal obligation to "recognize and affirm" Aboriginal and treaty rights. It is an essential part of identity and moreover, protection of land is considered to be a responsibility. It is not that Aboriginal peoples do not desire great economic success and independence, rather that it should not be at the sacrifice of the integrity of the land. Anderson et al (2006) describe the desires of Aboriginal peoples as the following: (i) greater control of activities on their traditional lands, (ii) self-determination and an end to dependency through economic self-sufficiency, (iii) the preservation and strengthening of traditional values and their application in economic development and business activities, and; (iv) improved socioeconomic circumstance for individuals, families, and communities through social entrepreneurship.

Striking a balance between cultural responsibility and economic success amongst competing interests is a difficult situation to navigate, to say the least. Despite having a body such as the Canadian Environmental Assessment Agency to mitigate potential environmental harms, many Aboriginal communities feel that respect for their authority and values in decision-making are peripheral at best.

Traditional Ecological Knowledge (TEK) can be defined as: "a cumulative body of knowledge, belief, and practice, evolving by accumulation of TEK and handed down through generations through traditional songs, stories and beliefs. [It concerns] the relationship of living beings (including human) with their traditional groups and with their environment." (Berkes,1999). Further, it is used to understand changing environments over time and thus contributes to a more nuanced understanding of the scientific and environmental. It often involves the traditional knowledge of Elders and uses this knowledge to more broadly define what is scientific, economic and environmental.

In order to achieve the most fruitful type of partnership with Aboriginal communities in terms of resource management, the utilization of TEK is an important factor. However, it has been noted that many Aboriginal communities have felt that corporate and conventional science interest parties have not taken TEK seriously. Paul Nadasdy (1999) writes:

> "A number of First Nations people have come to the conclusion that many scientists and managers have no real intention of trying to integrate traditional knowledge with science, but are merely paying lip-service to the idea because it has become politically expedient to do so. As a result, they often interpret the failure of scientists and resource managers to deal seriously with traditional knowledge as a calculated strategy for retaining control over the management of land and resources."

The design of an equitable partnership should consider TEK and the Indigenous Knowledge of Aboriginal peoples and communities not just simply as stakeholders in development, but as part of a framework for understanding, evaluating and knowing the ecology of natural resources. Without an explicit commitment to this, the duty to accommodate remains vague and can actually cause factionalism amongst stakeholders. Aboriginal peoples have an intimate knowledge of land and resources gained over thousands of years of living on the land and transmitting knowledge of it. The partnership between Aboriginal peoples and the land has pre-existed European arrival, continued through contact and has the power to inform the best possible environmental protections into the future. Creating this equity also requires clarifying government and corporate interests and jurisdictions in resource development.

Corporate Interests and Impact and Benefit Agreements

Impact and Benefit Agreements (IBAs) are negotiated agreements between Aboriginal communities/organizations and the private sector (usually extractive industries). The government maintains an observer role in these agreements to ensure regulations are upheld, but generally the state is in the periphery. This ensures a more expedient decision-making process. IBAs benefit the Aboriginal community in that the community will have a stake in the profits of the industry, as well as have some type of contribution in terms of the environmental assessment part of the agreement. O'Faircheallaigh (2003) writes: "On signing an IBA, an Aboriginal group accepts some restrictions to the exercise of their traditional rights and Aboriginal title, provides access to their lands, and, in so doing, supports the resource development project…In return, they accept a "package of measures"." These measures include economic benefits (labour positions, royalties, etc.) as well as a commitment to minimize harms on the environment and people. This too however is not standardized and does not guarantee a standard measure of power or that TEK will be incorporated as central body of knowledge to draw from.

In an attempt to mitigate these common errors and gaps in Aboriginal-Government-Corporate relations, Douglas Eyford (2013) as the Special Envoy for the Prime Minister's Office on the West Coast Energy issue released a report entitled, "Forging Partnerships, Building Relationships". In it he recommends a "principled dialogue" when managing government and corporate interests with Aboriginal ones. Eyford called on government bodies and corporate agencies to become involved in a more meaningful engagement with First Nations in order to create a more equitable partnership. Some of his recommendations include:

- convene conferences, workshops, and community forums to improve knowledge about the energy sector and major projects.
- establish a joint initiative with Aboriginal groups for environmental stewardship and habitat

enhancement to address concerns about cumulative effects of major resource projects.

- coordinate and convene the participation of key stakeholders including Aboriginal groups, governments, industry, non-governmental organizations, and scientists, to advance pipeline and marine safety and strategies to mitigate potential impacts of oil spills on the terrestrial and marine environment.

These are just a few of the recommendations in his report, but they serve as an example of how to define what the Duty to Consult and Accommodate requires in order to truly engage Aboriginal communities as fully-functioning partners. It is not just about creating jobs for Aboriginal peoples, or having an Aboriginal voice on a corporate board, but it is necessary to engage Aboriginal peoples and their knowledge as both valid and valuable in the environmental assessment process and in the future business of that particular corporation.

Nunavut

The largest comprehensive land claim to date in began in 1993 and resulted in the creation of a new territory - Nunavut in 1999. The landmass of this claim totals 1/5 of Canada. 83% of land title lies with Canada and 17% belongs to the Inuit (this 17% includes a portion of subsurface rights). Given the potential for mining opportunities in the North, natural resource extraction was a significant consideration in this agreement. Even though the majority of land ownership is federally controlled, the majority of the population (85%) is Inuit. Thus, the territorial government reflects largely Aboriginal interests.

Under the terms of the Nunavut Land Claim Agreement (NLCA), Nunavut Tunngavik Inc. (NTI) is a birthright corporation of the Agreement which oversees the implementation and fulfillment of promises of the NLCA. Specifically, the Department of Lands and Resources under NTI is responsible for specific Inuit land and resource rights under the NLCA. For example, under NTI's (2014) mandate, the Corporation must:

- administer and manage subsurface Inuit owned lands
- help to develop policies and procedures for the management and administration of Inuit owned lands
- ensure collection of royalties under the NLCA

The Department of Lands and Resources also works towards minimizing the negative environmental impacts of natural resource development while also maximizing the benefits of this development for the Inuit. The Department works with the Nunavut Impact Review Board to ensure these negative impacts are monitored. The Review Board oversees Inuit Impact Benefit Agreements which are required under the NLCA before resource development projects can begin.

In 2008, Nunavut Tunngavik Incorporated signed a Land and Resources Devolution Negotiation Protocol with the Government of Canada and the Government of Nunavut. This proposal will devolve federal jurisdictional authority to the Government of Nunavut over lands and resources with NTI as a major stakeholder in this transfer.

As you can see from the organizational chart of the organizations under the NLCA (see Appendix A), there are three Inuit-owned development corporations: Kitikmeot Corporation, Sakku Investments Corporations and Qikiqtaaluk Corporation. Projects within these corporations range from mining operations to road maintenance, catering and nursing.

There are of course non-Inuit owned resource development corporations in Nunavut. Baffinland Iron Mines Corporations is currently overseeing the $4 billion Mary River Project. This Project is focused on mining the

iron ore rich region of Qikiqtani and projects large increases of own-source revenue for the Government of Nunavut and NTI. Baffinland states that this project is in line with the Government of Nunavut's Exploration and Mining Strategy, which focuses on environmental safety and economic growth for Inuit peoples.

The Northwest Territories

On June 25, 2013 the *Northwest Territories Land and Resources Devolution Agreement* was signed between the federal government, the territorial government, the Inuvialuit Regional Corporation, the Northwest Territory Metis Nation, the Sahtu Secretariat Incorporated, the Gwich'in Tribal Council and the Tlicho government. It came into effect April 1, 2014. Prior to this agreement, each Aboriginal nation had a comprehensive land claim settled. The Gwich'in 1992, the Sahtu Dene and Metis in 1993, and the Inuvialuit in 1984. Each claim contained the transfer of title and lands, lands to be set aside for Aboriginal communities, federal transfer of monies, self-government and environmental management, and specific Aboriginal rights related to resource management.

The Ekati diamond mine is owned by BHP Billiton Diamonds. The company signed a socio-economic agreement with the Government of NWT which included a commitment to provide opportunities for "employment, training, and business opportunities for Aboriginal peoples". Approximately 1/3 of the mine labourers are Aboriginal and in 2006, the company spent "$326 million, or 78% of total spending on Aboriginal and northern businesses". In addition, four Impact and Benefit Agreements were signed with the Dogrib Treaty 11 Council, the Akaitcho Treaty 8, the North Slave Metis Alliance, and the Inuit of Kugluktuk. These agreements cover areas of scholarships for students, preferential hiring practices and annual monies transferred to the communities (Ekati, 2014).

While these types of Aboriginal-corporate relationships can be beneficial for communities, the recently passed Devolution Agreement could act to undermine the potential for future relationships of this nature. The Devolution Agreement has four parts: 1) the transfer of regulatory power over lands and resources from the federal government to the territorial government; 2) changes to the Territorial Lands Act, specifically to the penalty regime; 3) amends the Northwest Territories Waters Act in regulation and jurisdiction, and; 4) amendments to the Mackenzie Valley Resource Management Act (MVRMA) which implicates territorial and Aboriginal governments' jurisdiction and authority while giving powers to the federal cabinet. Shauna Morgan (2014) of the Pembina Institute states in her op-ed piece:

> "…the Bill consolidates permitting and licensing into one board based in Yellowknife with much smaller proportionate representation from each of the Aboriginal governments…the Bill gives a federal Minister the power to appoint the Chair of the consolidated board. The federal minister also gains the power to give binding policy direction to the remaining co-management boards that conduct land use planning and environmental assessments."

Aboriginal interests and TEK are not only being pieced out of this Bill, they are actually being amended from the original agreed-upon terms of MVRMA. State and corporate interests become centralized in this new regime with Aboriginal governments once again being gestured to as an outside party. For example, the federal government having the power to influence design and direction of environmental assessments will undoubtedly have huge repercussions on the level of restrictions on corporations pursuant to their ability to turn a profit. The Assembly of First Nations (2014) reports that:

> "The Bill makes sweeping and deep changes in terms of land and water boards and resource development in the NWT and has significant impacts on inherent title and

> existing agreements with First Nations…NWT First Nations have raised legal concerns with the amendments to the Mackenzie Valley Resource Management Act, and changes to water management boards. Additionally some First Nations have expressed concerns with implications of devolution on Aboriginal and Treaty rights."

This is not devolution in a real sense but rather a re-arranging of state power and authority over desired outcomes that are suited to particular interests. Without adequate consultation and accommodation, this Act poses potential constitutional infringements over Aboriginal lands and rights.

CONCLUSION: BEST PRACTICES

Given the complexities of Aboriginal lands and natural resource development, how can potential problems be mitigated in current and future development projects?

a. Invest and Commit to Traditional Ecological Knowledge (TEK)

Aboriginal peoples have a historic partnership that predates state and corporate structures: the land. Traditional Ecological Knowledge is the cumulative body of knowledge that has been transmitted for tens of thousands of years about place, territory and ecology. This type of knowledge is both scientific and personal, and is invaluable to the current and future practices that human beings have with the territory around them. When taken seriously, TEK can provide the basis for more responsible resource development as well as pathways to maintain or re-establish the integrity of that resource.

b. Empower Aboriginal Governments as Real Partners

Aboriginal governments are not strangers to deciphering between being a working partner in a real sense versus being cast to the fringe on a project. Since the times of the fur trade in the 16th Century, Aboriginal peoples have largely been acquainted with the latter. Re-establishing trust in the face of this history takes time, but can only be improved when Aboriginal peoples, skills and knowledge as partners are met with sincerity. While royalties and Aboriginal-specific job creation can benefit a community, these practices are defined by a relationship not a partnership. Appointing Aboriginal board members and environmental assessors does more towards achieving partnership in a real sense. Unfortunately, in most development projects the majority of Aboriginal-specific jobs are in high-risk areas (i.e. working in the mines) where injury and death have an increased chance of occurring.

c. Research Land Title Issues

This may seem obvious, but many development projects become halted or fall apart because the title or potential for Aboriginal title has not been considered.

d. We Aren't All the Same

The term "Aboriginal" implies we are all the same kind of people and perhaps even share the same types of opinions. The fact is, Aboriginal people are comprised of over 600 separate nations and speak 53 different Aboriginal languages. In addition, individual Aboriginal communities have distinctive ideologies: those who are traditional, those who are Christian, those who are pro-development, those who are anti-development, etc. It is best to find ways of accessing what the varied opinions and needs are in order to try and represent both seen and unseen stakeholders in a project.

e. Consulting and Accommodating is a Constitutional Duty, Not a Request

As we know from the previous discussion on this topic, the Crown holds the constitutional obligation to consult and accommodate Aboriginal peoples and interests. While the practice of this is still not wholly standardized or understood, it has nevertheless been enforced by the courts resulting in the standstill or dismantling of development projects. It is in the best interest of not only Aboriginal communities to consult on Aboriginal interests, but also will produce a more meaningful and equitable project for all stakeholders involved. While consulting and accommodating under the current AANDC Guidelines has improved Aboriginal relations relative to past refusals to consult at all, governments and corporations should not consider themselves limited by it. An alternative process for example could consider requesting terms from various Aboriginal interest groups on how they envision a fair and satisfying consultation might be achieved.

f. Allow Corporate and Government Interests to Evolve and Change

Development projects are designed with planned outcomes including duration of the project, projected profits, etc. In many cases, Aboriginal interests are perceived as conflicting with this design and thereby these interests are modified or changed. For example, arranging for elders and knowledge keepers to evaluate a natural resource development project within a TEK framework may add unforeseen time and dollars into a project, but what is gathered from this process may become a value-added contribution that was never anticipated.

QUESTIONS FOR DISCUSSION

In the context of duty to consult and accommodate, over the next 5 years:

- What will be the 3 main drivers of change?
- What will it take, over and above present best practices, to reach a new level of performance?

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