

Aboriginal Law Uncertainty: Implications for Energy

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Pattern of Significant Uncertainty on Aboriginal Law Bearing on Resource Issues

- Limited specificity of *Constitution Act, 1982*, section 35: “35(1) The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.”
- Judicial preference to try to foster negotiations and reconciliation – strong uncertainties in areas like title jurisprudence, duty to consult jurisprudence, etc.
- Judicial reluctance to consider policy implications for industry in any direct way
- Continually changing trends and strong divergence in expectations of future law as between different parties – amplified by nature of academic and media discussion

An Example from *Tsilhqot'in*

- Legal doctrines developed in terms of precedent and broad theories of law, without attention to policy implications even for Aboriginal communities themselves
- Inherent limit: Aboriginal title is held communally for the benefit not only of the current generation but also for future generations – uses incompatible with that principle are not permitted by Aboriginal title - communities may not be able to authorize certain developments, or authorizations may need to be sought in new ways
- Who has standing to put arguments on behalf of future generations in the case of a dispute over a community's decisions is not clear

Consent Issues in *Tsilhqot'in*

- Decision does not cite UNDRIP even though was argued
- “Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.” (para. 97)
- “Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.” (para. 92)

Immediate Implications for Industry

- Strong continuing role for industry engagement directly with Aboriginal communities, IBAs, equity stakes, joint ventures, etc. – though those always need to be carefully considered for what is possible, for implications they have for later sale, etc.
- Complex questions of managing uncertainties in contexts with title claims
- Complex picture on expected litigation vs. negotiation in years ahead
- Anecdotes of capital flight, but also success stories and opportunities

Even More Questions Ahead

- Complex intersection of differing expectations - implications for negotiations
- Questions of modern treaty interpretation
- Reopening of “unfinished treaty business” on historic treaties
- Inequalities between position of different Indigenous communities
- Issues concerning processes amounting to adequate consultation and accommodation on long linear infrastructure projects and projects with cumulative impacts, amongst other issues
- Impact of developing international law on Canadian companies operating abroad and on Canadian domestic settings

Developing Paths Forward

- Greater education and clarity in public and communities on various issues
- Issues concerning fundamentally changed relationships – resource revenue sharing arrangements? Larger restructured relationships?
- Possibility of Reference questions to the courts to seek resolution on some legal questions without waiting as long for litigation on them
- Negotiated approaches/guidelines on some legal questions

Questions/Discussion

- Thank you!
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