



Agreements over resource development aren't a necessity, says Keith Bergner, a specialist in aboriginal law with Lawson and Lundell LLP. 'The duty is to consult, not a duty to agree,' he explains.

ABORIGINAL TITLE | Certainty still a question in land rights and resource development

Several issues make agreement between first nations and mining companies difficult

BY DERRICK PENNER
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When First Nations Summit executive member Douglas White looks over the map of British Columbia, he still sees an uneven landscape when it comes to meeting obligations to consult with aboriginal communities over resource development.

On the one hand, he watches as first nations, such as the Tsilhqot'in in the Cariboo, are in a prolonged battle opposing a \$1.5-billion copper-gold mine some 120 kilometres southwest of Williams Lake within its claim territory.

On the other, groups such as the Taku River Tlingit in the far northwest are striking agreements with the province for joint decision-making in land-use planning. For the Taku, their agreement, signed this summer, covers 11,500 square miles around Atlin.

"It's a real mixed bag," said White, chief of the Snuney-muw First Nation, and member of the First Nations Summit's political executive. "Sometimes, if there's a project where the first nation is able to come to a good arrangement with a proponent, then things go well, and that's fine. But when there are concerns expressed [by a community], quite often that doesn't go well."

Treaty gap
With no treaties with first nations over much of B.C. while the province is in the middle of a multi-billion-dollar resource boom, accommodating aboriginal interests on the land base remains a key outstanding issue for resource development.

"It's absolutely the No. 1 issue facing the [mining] exploration and development sector in the province," said Gavin Dirom, CEO of the Association for Mineral Exploration B.C.

Dirom added that mining companies have seen increasing understanding of the consultation process as more first nations become involved in dealing with the requests that are referred to them by the



Taseko Mines' Prosperity mine has been the subject of first nations' opposition.

province regarding exploration work that firms want to do.

However, companies are still looking for more clarity around what areas of the province are absolutely open, or absolutely closed to mine development, which is where Dirom said miners feel caught in the middle of the consultation process.

New projects

Dirom added that many companies have had success moving projects forward by working with the province and first nations to strike individual benefit agreements.

New Gold Inc.'s New Afton mine near Kamloops and Thompson Creek Metals' Mount Milligan mine north of Fort St. James are two examples of such developments in which surrounding first nations' interests were accommodated.

He also said initiatives such as the agreement signed this summer between the province and Taku River Tlingit, which established a formal joint land-use planning process between them, add further

clarity for potential resource development.

"It's the government's duty to consult, and it's the first nations' obligation to participate [in consultation] and hopefully we'll move projects forward, or have clearer decisions sooner," Dirom said.

However, from the province's perspective, it is difficult to create any type of template for consultation and accommodation of first nations' interests, according to Mary Polak, minister of aboriginal relations and reconciliation, because those interests vary so widely between first nations.

"Treaties would be the most comprehensive and final way of addressing recognition," Polak said. "Nevertheless, we recognize that treaties take a significant amount of time, and in many cases, both the first nations and the government want to move ahead with economic opportunities."

Finding opportunities

She added that the province's focus has been to identify opportunities for those kinds

of non-treaty agreements with first nations where their specific interests can be addressed and government is "able to get some benefits on the ground right away."

However, White said the process of dealing with consultation and accommodation on a case-by-case basis can be draining on individual first nations, which don't have the same financial resources as government to draw on when it comes to evaluating all the applications for resource work in the respective territories that they claim.

He added that the first nations would prefer it if governments would focus on working with them to arrive at a broader definition of aboriginal title, which is what they had hoped would be addressed in treaties.

White added that in discussing title, first nations want an acknowledgment that they are beneficiaries of the land, and that their consent is required for development.

White said first nations and the province, in 2009, were close to finding a definition in the provincial Recognition and

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Reconciliation Act, which was eventually withdrawn in the face of opposition including industry and business groups.

Polak said the 2009 legislation sparked opposition from within first nations communities as well, and added that the province has more than first nations' interests to balance.

"We continue to have those discussions, we are all alive to the fact that if we could resolve the issue of aboriginal rights and title in a more comprehensive way, it would certainly make the path forward much easier," she said.

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Finding a deal

While the preference is to reach agreements with first nations over resource development, agreements aren't a necessity, according to Keith Bergner, a partner and specialist in aboriginal law with the firm Lawson and Lundell LLP.

"The duty is to consult, not a duty to agree," Bergner said in an interview.

"If an aboriginal group and Crown ultimately disagree whether to consult [on an issue], a court can be asked to rule on that."

Taseko Mines' initial Prosperity mine is another example where the province, in 2010, approved a major development despite the opposition of first nations, deciding that the project's economic benefits outweighed environmental concerns.

That project was rejected by a federal environmental assessment; however, federal Environment Minister Peter Kent this week ordered a new review for a revised design of the mine, to which the Tsilhqot'in have restated their opposition.

It would be a mistake to ignore that opposition, according to Shawn Atleo, national chief of the Assembly of First Nations.

"Unilateral decision-making and not engaging with first nations, especially right from the beginning [of projects], is the wrong way to go," Atleo said.

He added that the position of first nations is that their rights and title mean that they should not be treated as "just another stakeholder" in land-use decisions.

"Rather, Atleo said he would prefer that governments adopt principles of the United Nations Declaration of the Rights of Indigenous People, to which Canada is a signatory. That document sets out requirements for the "free, prior and informed" consent of indigenous people when resource development is concerned.

Atleo added that Canada's first nations aren't opposed to development. Communities see considerable opportunities to benefit from an estimated \$400 billion worth of resource-related projects being proposed across Canada that involve aboriginal interests.

"It's a major, major challenge and opportunity for unleashing economic potential, as well as well as for first nations to shape how to define sustainability and sustainable development."

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