FEATURE

Gold Rush? No Rush

Negotiating a deal between corporations and First Nations communities can take years — an eternity compared to other deals. But time and mutual respect have proven to be keys to closing the deal

BY MARZENA CZARNECKA

FOUR YEARS, five months and three days. That's how long it took Canadian mining company Goldcorp Inc. to ink a deal with the Cree Nation for the development and exploration of Goldcorp's Éléonore gold project in northern Québec. And the company is not complaining about the prolonged timeline. Instead, it's celebrating the collaboration agreement as a milestone in its own business dealings with Aboriginal groups, perhaps even a massive historical milestone that sets a new template for how the mining industry does these kinds of deals.

What's unique here isn't that it took four-plus years for the Cree and Goldcorp to get from a letter of intent to a signed deal, because deals that involve First Nations almost invariably proceed along a protracted timeline. "Many of the companies that have significant involvement with First Nations communities have a full recognition that the deals can now take much longer to negotiate, particularly if you have a very large-scale project with significant interests at stake," says Heather Treacy, a partner with Fraser Milner Casgrain LLP in Calgary. "It can take years to negotiate a deal with a First Nations community."

As it did here. But what sets the Éléonore deal apart from the pack – the pack, in this case, being the array of impact benefit agreements (IBAs) that usually define deals industry does with First Nations and Aboriginal groups – is that the project proponent went into the negotiations intending to take as much time as necessary to get the right deal.

Think on this for a second: four years and change to the execution of an agreement. In a world of 30-day takeover bids and 21-day consultation processes, it seems like an eternity, and even as Goldcorp and its negotiators were lauding themselves for a job well done, critics were latching onto the extended timeline and its implications on business realities. "Some people may say that's too long, it doesn't make business sense," notes Jean M. Gagné, a Québec City partner with Fasken Martineau DuMoulin LLP, who represented Goldcorp in the negotiations. But, as Gagné points out, project plans did not stand still during those four years, progressing from theory to early exploratory stages to an advanced exploration framework, parties constantly at the table, continually negotiating, and then smoothly moving into implementation in what Gagné calls "the context of the real life of the project."

It's too early yet to call the Éléonore collaboration agreement an unequivocal success. Its very existence, however – and the willingness of one of Canada's largest extractive players to invest the time and resources it did to make the deal work – is indicative of a major shift in both how industry does business with Aboriginal communities and how those communities approach deal-making with industry. And it has nothing to do with the Supreme Court of Canada's pronouncements on duty to consult and accommodate, and everything to do with economic imperatives. Economic imperatives as recognized by both industry and Aboriginal communities.

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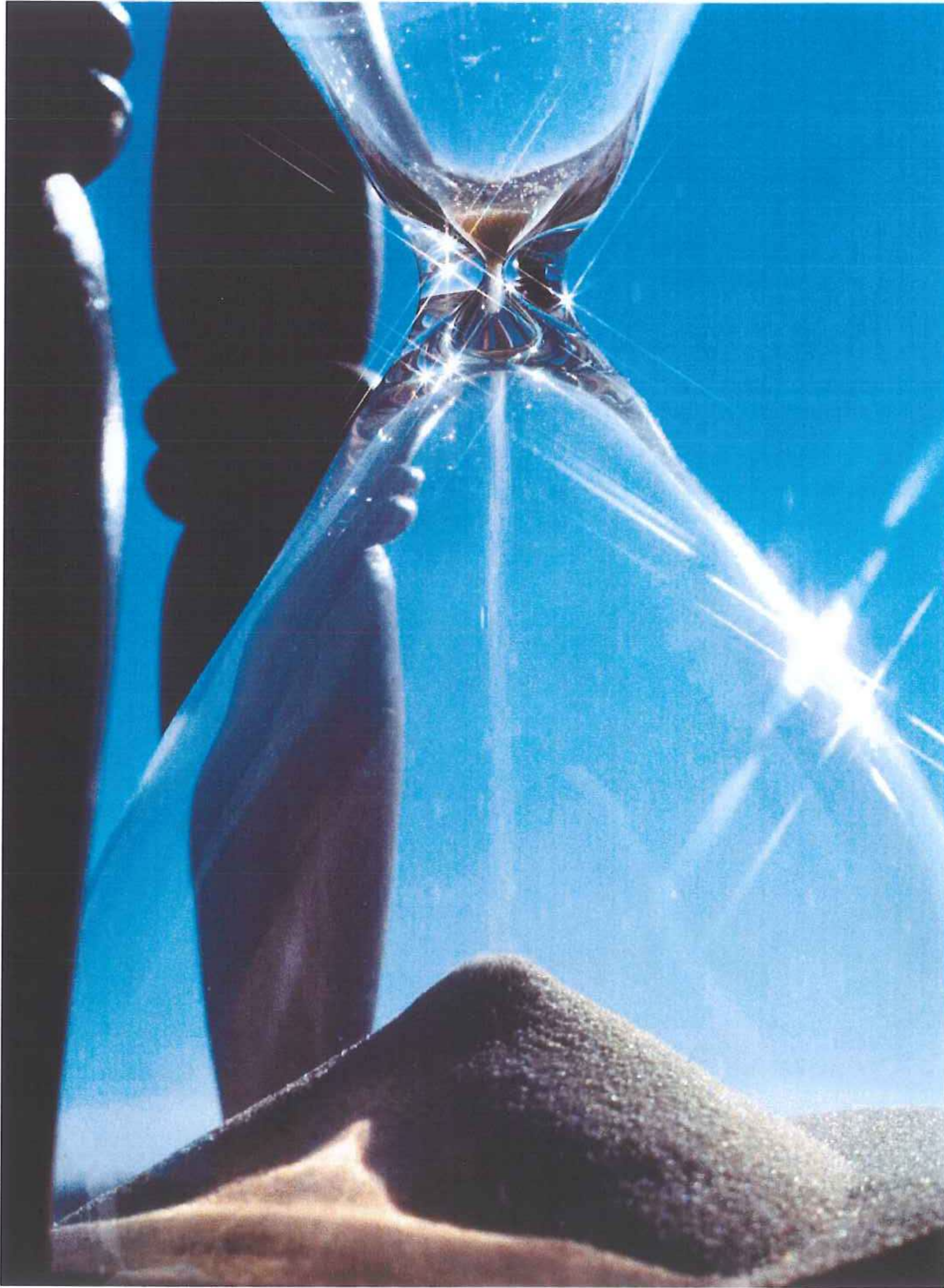

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Perhaps that's an overstatement. The framework set down by the Supreme Court of Canada in the 2004 *Haida Nation v. British Columbia (Minister of Forests)* that invokes "honour of the Crown" and sets upon it the duty to consult, and when necessary accommodate, when considering development that could potentially impact Canada's First Nations and Aboriginal people had a significant impact in how project proponents approached First Nations.

Bob Adkins, a partner with Winnipeg law firm Thompson Dorfman Sweatman LLP, has been practising in the field of Aboriginal law for more than 20 years, representing both Manitoba's Aboriginal groups and industry project proponents. As he sees it, what's changed the most during the course of his practice "has been the recognition by our society and our courts of Aboriginal rights — that's been a real touchstone, a real catalyst for progress."

THE CASE LAW around Aboriginal rights is an evolving area of law; the subset of this stemming from *Haida Gwaii*, recently clarified by cases such as 2010's *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* and *Beckman v. Little Salmon/Carmacks First Nation*, a nascent one. And, in a way, the Haida framework sets out the minimum that's required of a project proponent. To get a deal done – to get deal certainty – that's not enough.

"There are two main approaches," says Caroline Findlay, a partner with the Vancouver office of Blake, Cassels & Graydon LLP. "There's the 'let's go by the book, let's follow the Haida' framework, do what we are supposed to do, and ensure the Crown does what it has to do. But among my clients now, what is prevalent is the idea of having a social licence — people who say, 'Well the framework is interesting, but I don't buy the idea of no veto.'"

Nothing in the case law gives Aboriginal groups a veto over projects or government decisions pertaining to them — "I think there is a practical veto and I'm interested in having a social licence."

What does this mean? Different things for different clients, but for the practice of Aboriginal law it's an immense paradigm shift. Whether a client is pursuing social licence or deal certainty, what this translates into down on the ground is an approach to deal-making with First Nations

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BLAKE, CASSELS & GRAYDON LLP

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that's a world apart from reluctant consultation hoop jumping.

It's an approach that takes, as the Éléonore project illustrates, time, or as Ian Getty, Research Director with the Stoney Nakoda Tribal Nation in Alberta puts it, "patience." Not a word industry uses much in its deal or project planning, but a characteristic of virtually every successful deal with an Aboriginal community.

If you don't have that characteristic, you'd better start cultivating it. "The single biggest issue facing projects going forward in this country is Aboriginal issues — even more so than environmental issues," says Thomas Isaac, a partner with the Vancouver office of McCarthy Tétrault LLP and head of the firm's national Aboriginal law practice.

The issues faced by Aboriginal communities are massive public-policy issues. But neither industry nor First Nations can afford to wait for the Crown and its representatives to sort them out. Isaac is blunt. "We've got a big problem in this country, and it's the lack of public-policy development and implementation across the board," he says. "It's the underbelly of why the deals have become so critical [to communities and to industry], and that's because of this [policy] uncertainty out there."

Uncertainty. Or inertia. The concept of duty to consult has both its fans and its critics. For First Nations, as a tool through which to achieve either policy change or negotiation leverage with an industry project proponent, its utility is ... imperfect. "Right now, if within the duty to consult [framework], as a First Nation you go to court and are successful, you end up getting an order for more consultation," says Charles Willms, a partner with Fasken Martineau in Vancouver and head of the firm's Aboriginal law practice. "So it's like winning a pie-eating contest and learning the prize is more pie. What does that get you?"

No closer to a deal. And a deal is what most communities want. If the recognition by courts, society and industry has been, as Adkins calls it, a touchstone, then its almost inevitable consequence has been the "increasing desire of First Nations to participate in the Canadian economy," says Treacy.

BETWEEN THIS desire and industry's desire to push the geographical frontiers of natural resource projects, the nature of the Aboriginal law practice has changed irrevocably. Aboriginal law used to be equated with Aboriginal rights and title claims litigation work. Then an environmental-regulatory compo-

nent – still with a strong litigious flavour – was grafted onto the practice. Now, "what we see more and more is the dealmaking side of the practice," says Sandra Gogal, a partner with Miller Thomson LLP, whose practice has reflected this business shift. And the deals she sees are "innovative deals, structured to accommodate real needs on the ground that reflect the circumstances of the communities involved, and these business arrangements are not being driven by the laws of accommodation and consultation."

Rather, they're being driven by "First Nations asking for their share of opportunities," as Nadir André, a partner with business law firm BCF LLP in Québec City, expresses it. "Most of them are not opposed to development, but they've been looking at the train pass by, and nobody asked them to join. They want on."

But getting on takes — what was that word Ian Getty used? Ah, yes, patience. By both sides. When duty to consult case law gave birth to IBAs, people viewed them with "rose-coloured glasses," says Robert Janes, a partner with Victoria's Janes Freedman Kyle, which represents First Nations on a plethora of constitutional, commercial and other issues. "People thought this is great, we can avoid all these consultation fights. It's the clichéd win-win on both sides. ... Then we saw a spate of these agreements being signed, and then people started building up experience as to how these things actually work."

Among the biggest stumbling blocks to an IBA's success, says Janes, is "pure capacity to deliver. Say a band enters into a relationship with a company, and part of the relationship is delivering a service — how does this get done if the First Nation doesn't have the experience necessary to deliver this service?" The win-win becomes a lose-lose: industry doesn't get the service specified; the band doesn't get the payoff. "And you'd also find First Nations gearing up for projects, doing capital investments, investing in training, and then finding that, especially if what was involved is a one-contract deal, didn't justify these capital expenditures. They found they actually lost money on deals."

It's a pattern that still dogs IBAs and deal negotiations. "Communities may be keen to sign on to these new business activities, but they may lack the capacity to deliver them," says Gogal. "It can be a case of too far too soon." If there is too much ambition and not enough planning and preparation, such a venture is doomed to fail — unless industry helps the community build up that capacity.

SANDRA GOGAL
MILLER THOMSON LLP

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Industry is not unwilling. But negotiations focused on capacity building soon send the parties into dangerous territory. Keith Bergner, a partner with the Vancouver office of Lawson Lundell LLP, calls it "the shadow of the law." That's where he sees industry-Aboriginal negotiations taking place — within the "shadow of the consultation and negotiation processes identified by the courts." Because no matter how frustrated either or both sides may be with them, there they are, and they are the law of the land. And that means that at all discussions between the community and the project proponent, there is a third party at the table. The Crown.

"It's the Crown that holds the legal obligation," says Bergner. "That adds enormous complication to the negotiations. It's a tripartite relationship that you try to solve by bilateral negotiations."

It's an odd situation. "Industry is keenly interested in securing First Nations support, and obtaining First Nations acknowledgement that the duty to consult and accommodate have been met and discharged," says Bergner. At the same time, industry doesn't want to – and frankly, can't – take responsibility for either the Crown's honour, or its behaviour, past, present and future, while the First Nation doesn't want any aspect of its deal with industry to jeopardize any ongoing negotiations or litigation it may have with the Crown over rights and title.

The temptation, then, is to keep the Crown out of it. "The Crown not being involved at the beginning of a deal is usually a positive thing," says André frankly. At Stoney Nation, Consultation Manager Peter Snow is also a fan of direct, bilateral negotiations with business. The Stoneys eschew the Government of Alberta's consultation process, for example, for their own detailed, nine-step one. "We are asserting our Aboriginal treaty rights through our own consultation process," says Snow.

Is this a good thing? Janes isn't sure. "I have mixed feelings about it," he says. "One of my great reservations comes from the fact that governments have viewed these deals as being the accommodation — the business deal is viewed as the solution. The underlying issues of rights aren't being dealt with."

When Janes and his firm advise First Nations, "we really put an emphasis in not letting the Crown off

the hook. Because in reality you don't have to feel that my heart is breaking too much for these companies, but the companies are being asked to do what is impossible.

"In many cases, the First Nations complaints aren't solely specific about this project right now. Usually [the view is], if this project was by itself, it would be great — but this project is combined with forestry, mining, oil sands, other projects, and we've got 25 other projects that are in various stages of regulatory approval and our problem is coordinating all of them." An apt way of thinking about this, says Janes, is to understand that "the company is fighting a battle, and the First Nation is fighting a war" on many fronts.

BUT YOU CAN'T wait for it, no matter how full your reserves of patience are. This is the quandary facing both First Nations and industry when they start the dance, whether they claim to do it under the formal duty-to-consult umbrella or otherwise. It's rare that a company doesn't think time is of the essence, and doesn't have a timeline driving the project. "And as either a First Nation or industry, you know you're not going to get government to deal with it within that time frame, so do you hang tough, and essentially get nothing? Do you drag [the other party] through courts and face the uncertainty that comes with that? Or do you do the deal?" asks Janes.

That's why, in many cases, both First Nations and companies walk away from the table with "a bitter taste in their mouths when the deal is done," because in the end, the deal, however unsatisfactory, is the only real choice. And, in a perverse game of dominoes, the deal, no matter how good, also doesn't address any of the underlying issues for the First Nation – most of which are historical and between the First Nation and the Crown – and just, as Janes puts it, "defers the problem to the next company in line." Which, in turn, does its utmost to do a deal without taking on too much of the Crown's burden, and again passing on the hot potato.

The Éléonore negotiators, who included Goldcorp General Counsel (Canada & US) Andrew Moshoian, as well as Fasken Martineau's Gagné for Goldcorp, and Cree lawyer Jean Pierre Murdoch and Gowlings' François Dandonneau_for the Nation's Grand Council, wanted to neither pass on the hot potato nor absolve the Crown from future responsibilities, and they wanted the right deal for everyone.

They didn't eschew deadlines but they drew up a generous timeline, scheduling frequent meetings and parcelling out the agendas for them in small, digestible and logical bites. They spent a great deal of time up front getting to know each other in formal and informal ways — the latter included drafting a joint mission statement for the project negotiations, the former starting every meeting by exchanging personal news and updates. They didn't talk money until they had hammered out everything else.

The resulting agreement will be impossible to copy, because there are "no set cookie-cutter agreements" that work, as Adkins puts it. What makes them work is the extent to which they take into account the unique needs and circumstances of each deal, community and project proponent. But if there is no magic formula, there are some common elements to a successful deal. From a First Nations perspective, Janes enumerates them as follows: "First, everybody goes into the deal with open eyes, about both the needs of the company and the capacity of the First Nation," he says. "Second, the deal is actually structured to address those issues."

Sounds obvious but if it will take 10 years' time, for example, to ramp up the capacity of the First Nation to deliver what the company wants in terms of employee or service contracts, and the project peaks in three to five years, the deal is doomed to crater.

"Third, the deal should have something that sees a benefit go to the whole community." The flip side of that, which he says makes parties "walk away from the table happiest, is the recognition that the First Nation is really bringing something worthwhile to the table," — i.e., industry recognizes the value of the members' knowledge, experience, participation or co-operation, instead of viewing the negotiations with the First Nation as a one-way, costly pacification. And the final ingredient – doesn't happen often, but when it does, it bodes well not just for this deal, but future deals – is giving some attention to what the Crown should be doing. "In many cases, it is possible to say we're both going to bug the government to address this issue," says Janes.

For Bergner, what makes a deal more palatable to both the First Nation and the project proponent boils down to employment and training opportunities, business and contracting opportunities, and of course, financial consideration. What trumps them all, again, is time: the longer-term the deal and the arrangements, or the more frequently the parties have dealt with each other, the better. Bergner points out that in any partnership, joint venture or service arrangements, it's during the first year that the most "transitional

problems and growing pains" occur. "The second year is better, the third year is really good," he says. The fourth year is poised to be awesome, but if that's the year the project ends, "all you get is the pain without the payoff."

Treacy agrees. "With repeat deals, there is great success," she says. At least in part, of course, because the relationship between the two parties has already been well established.

THE ÉLÉONORE negotiators invested heavily in their relationship, and it is now conventional wisdom among dealmakers working with or for First Nations that relationship building is critical. Stoney Nation's Snow reinforces this. "Good deals start by building a good business relationship," he says. He tells the story of an oil and gas VP who calls him up to see if members of the band have time for a coffee, even though the company currently does not have an active project on Stoney lands. "That attitude is good," Snow says. It will make closing the deal, should they start working in earnest, easier.

For Tom Isaac, however, that's not enough. "A relationship doesn't get your project approved. What gets you financing and regulatory approval is legal certainty," he says. "I've seen people go after just the relationship and in some instances, there is not a happy ending." He doesn't dismiss this softer art but he cautions project proponents and their advisors, and for that matter First Nations, to keep in line with legal obligations as well.

"Industry needs to ensure their legal house is in order on deals, and this includes ensuring consultation is carried out and meets the legal standard," he says. "I've been in situations where the 'deal' has been done and despite First Nations' approval, the government didn't approve the project, saying, 'We don't care about your deal, we have to ensure the honour of the Crown.'"

Moral of the story: even if in this new dealscape consultation and accommodation aren't what's driving the deal, dot your "i"s and cross your "t"s on that process. Just in case.

Dotting "i"s and crossing "t"s on consultation is important for another deal stakeholder, one that isn't officially at the table either, but one that's just as important than the Crown. "One of the audiences I keep in mind when drafting a deal isn't just the First Nation or developers or the government — it's the lenders," says Isaac. "The First Nation doesn't see any benefits flow unless lenders buy into the project." The lenders are looking for deal certainty too. They're also looking for the right price – and they have a much more rigid notion of what that price is than the First Nation – or even the project proponent.

Now, there's a very cogent reason why the Éléonore negotiators left money to the end. Inability to come to terms over money kills most deals, whether they involve a deal with Aboriginal communities or not. Disagreements over money can be particularly sharp in these deals, however, because neither party may have a clear understanding of what it is that it's getting from its counterpart — and how much this thing is worth.

START WITH First Nations' expectations. "What I've observed, fundamentally, is expectations being too high by First Nations," says Isaac. "But the real question here is why are the expectations too high." The not-so-simple answer is, there are dozens if not hundreds of project types that proponents from various industries bring to the table, and the costs involved in developing these – and the expected revenues – vary wildly.

If the community involved does not understand the industry and the economics of its projects, it is impossible for it to have a reasonable idea of the dollars involved — and available. It appears obvious that it's up to industry, through the consultation, relationship-building and negotiation processes, to provide this information.

But industry is confused too. "This is a tough issue for the business community," says Findlay. "How much money is enough?" What is it that the project proponent is paying for? Access, non-opposition, co-operation, knowledge ... deal certainty? And what's the price tag one attaches to deal certainty — without crossing into economic unfeasibility?

"When you have two parties who don't really know what the right number is other than what can we engineer as part of the deal, it creates both market freedom and a great deal of confusion," says Findlay.

It's not going to get simpler any time soon. But then, it doesn't have to be simple, it has to be fair. Says Findlay, "This is socioeconomic re-engineering," and yes, it has a price tag. If what industry and communities are doing is working "together to reintegrate First Nations into modern Canada, what does that mean if it doesn't mean sharing wealth?"

It's not surprising that public policy and legislation have failed to address these concepts adequately. Will Aboriginal communities and industry project proponents, operating in the "shadow" of the consultation case law, do better? Perhaps. If they have the will — and the time.

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