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Legal Challenges for Mining Companies New to Canada's North

Mining companies investing for the first time in Canada's North may find the experience unlike any other. This holds true not only for foreign corporations, but also for companies familiar with mining in the Canadian south. This article provides an orientation around some of these unique challenges.

Aboriginal groups and mining companies in the North – A multi-faceted relationship

The relationship between Aboriginal groups and mining companies in Canada's North has many facets. In some cases, the Aboriginal group or First Nation truly is the landlord. Some examples would be where the mine is located on Inuit-owned land in Nunavut, or on Category A or B lands in the Yukon. The Aboriginal group owns the surface of the land needed for the mine, mill, camp, ore stockpile, waste rock storage, fuel storage, and tailings impoundment. In these circumstances a lease will be required. The Aboriginal group will approach the lease negotiation just like any other commercial landlord. It will want to maximize returns and preserve the commercial value of the land.

An additional dimension emerges because the Aboriginal group also represents land claim beneficiaries, where land claim agreements have been concluded, or claimants, where land claim agreements are still under negotiation. The Aboriginal group will want to protect traditional uses of the land and preserve cultural values for future generations.

Furthermore, the Aboriginal group and the mining company will frequently negotiate another agreement in parallel: an impact benefit agreement. This agreement offers a negotiated means to mitigate detrimental impacts of the project and to provide economic benefits for the Aboriginal group and its members. It provides the mining company's social license to operate.

All of these factors result in a complex and symbiotic relationship.

The key differences between Aboriginal groups consultation work in the north and the south

The first key difference between Aboriginal groups consultation work in the north and south is that, in Northern Canada, the majority of the Territories are covered by modern land claim agreements - including the Nunavut Agreement (1993); the Inuvialuit (1984), Gwich'in (1992), Sahtu (1993) and Tlicho (2003) Agreements in the Northwest Territories; and the Final Agreements concluded under the Umbrella Final Agreement with 11 of the 14 First Nations in the Yukon. When a modern land claim treaty has been concluded, you look first to it see if it provides for some form of consultation. The Yukon Supreme Court decided in a case this year

that consultation as a doctrine exists independently of the treaty, but the treaty may set out the elements the signatories regarded as the appropriate level of consultation.

The second major difference is that, in many areas of Northern Canada, Aboriginal groups form the majority of the population. Obviously, this may also be true in certain areas in southern Canada; however in the south there are more often other third party landholders and interest groups. In this Northern context, the success of the consultation and negotiation process is even more critical to the success of a project.

Mining companies' provision of services for communities in the North

Mining companies are not government agencies and should not be providing social services. On the other hand, there are potential detrimental effects which have to be mitigated and the company has responsibilities to its employees and affected communities. For example, a new mine means more jobs and disposable income which may lead to increased alcohol and drug use. The mining company may offer substance abuse counseling to employees and community members. In addition, because in the North many in the workforce may be new to industrial work or need their skills, education and qualifications upgraded, the company may find it necessary to provide training and education programs as part of its human resources management.

Northern environmental and social responsibilities pose few surprises for foreign mining companies

Mining companies, domestic and foreign, take their environmental and social responsibilities very seriously. Some developing nations may call for less than the best practices required in the Canadian north, but in my experience mining companies would adhere to the higher standard anyway, set by their corporate governance policies. Despite, their already rigorous adherence to more stringent best practices, it can be an eye-opening experience for some mining companies when they learn about the multitude of northern regulatory boards.

The contributions of lawyers to project development

Lawyers are typically involved from early exploration and mineral tenure acquisition through closure, but the most legally intensive stage is at project development. This stage involves environmental assessment and regulatory permitting; impact benefit agreements; environmental and socio-economic monitoring agreements; development partnership agreements with local government; financing; engineering, procurement and construction contracts; human resources and industrial relations policies; and immigration. Occasionally, but not often, litigation occurs.

One of the biggest gambles that a company can make is trying to go it alone through the aboriginal consultation and regulatory processes, using technical consultants but not lawyers. Sometimes this works, but sometimes it doesn't. The approach fails to recognize that, while the processes are largely technical, they are also legal in nature. Lawyers can help to keep the scope for environmental assessment purposes manageable, ensure that responses to requests for information are adequate, and prepare the company for public hearings, all with a view to a favorable outcome. Lawyers can also ensure there won't be a legal challenge to the process, or that, if there is one, it will not succeed.

Lawson Lundell has been actively engaged in mining in Canada's North for twenty years, starting in 1992 when they acted for the buyer of the Con Mine in Yellowknife, followed by acting for the developer of a diamond mine. Currently, the firm provides legal support for the development or operation of nine mines in the Yukon, Northwest Territories and Nunavut as well as to several exploration programs.

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