

Mining and Natural Resources Law

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The New Gatekeepers to Resource Development in Canada

A seismic wave continues to surge in the Canadian resource sector, as it is now widely accepted that Aboriginal groups wield unprecedented power and authority over resource development following years of intense legal activism. The recent Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia* represents a culmination of a series of court decisions resulting in recognition of a claim for “Aboriginal title.” To the extent they have not done so already, corporations and governments ought to re-examine their relationships with Aboriginal groups and look for new ways, including revenue sharing, to include Aboriginal groups as stakeholders in resource projects if they are to proceed in traditional Aboriginal territory.

Canada’s economic prosperity is closely tied to the development of its natural resources. In the past, resource development largely proceeded with little consideration for Aboriginal groups. Aboriginal groups were rarely viewed as participants in the process and even less frequently as economic partners. The Macdonald-Laurier Institute’s recent report *Sharing The Wealth*¹ (the “**Report**”) provides further evidence that the role that Aboriginal groups play in the development of Canada’s natural resources is changing dramatically. Aboriginal groups have, in recent years and following various legal victories, negotiated far more extensive arrangements with resource companies than was ever possible in the past. Aboriginal groups are

becoming increasingly successful in working with business interests to negotiate the following three types of arrangements: (1) company payments to communities for developments within traditional Aboriginal territory; (2) training and employment arrangements with the resource companies; and (3) subcontracting opportunities with the major developers.

The Report indicates that some provincial governments have entered into revenue sharing agreements with Aboriginal groups for the following reasons:

- revenue sharing agreements were negotiated by the federal government into modern treaties and are therefore constitutionally protected Aboriginal and treaty rights;
- governments want to encourage resource development and know that Aboriginal opposition could slow down or stop commercial activity; and
- governments worry about potential court rulings that will, by extension of existing decisions about Aboriginals’ land and resource rights and obligations to consult and accommodate, compel the sharing of royalty payments with Aboriginals and governments.

With increasing power and influence being wielded by Aboriginal groups, it has become increasingly apparent that sharing resource royalties may be a required cost of getting Canadian resources to market. However, not all provinces agree and the implementation of resource sharing agreements is not consistent across the country. Notably, Alberta and Saskatchewan have rejected the notion of resource revenue sharing with Aboriginal groups.

¹ Coates, Ken S. “*Sharing the Wealth*”, A MacDonald-Laurier Institute Publication, January, 2015

Goodman's^{LLP} Update

Despite the opposition of certain provinces, it appears that resource development companies are recognizing the potential benefits of resource revenue sharing. The Prospectors and Developers Association of Canada has indicated its support for resource revenue sharing and noted the economic benefits that flow from it, including greater participation in the mineral sector. Additionally, various mining industry participants have stated that resource revenue sharing agreements with Aboriginal groups would improve access to resource-rich lands and encourage greater Aboriginal support for resource projects.

Conclusions

The recent court decisions and the overriding responsibility of the Government to consult with Aboriginals has established that Aboriginal groups have significant rights with regards to the development of Canada's natural resources. The relationship

between industry participants in Canada's resource sector is rapidly changing and it is clear that Aboriginal groups will no longer be passive observers in the development of Canadian resources - they are demanding a seat at the negotiating table. Aboriginal groups have demonstrated an acute ability to force project delays or cancellations and therefore cannot be ignored or shut out of the process. Future resource developments in Canada will require creativity on the parts of industry and Aboriginal groups to ensure that they obtain their fair share of the resource wealth from any project in their traditional territory. Non-governmental revenue sharing arrangements with Aboriginal groups will likely become more common in obtaining the social licence from these groups to develop lands in their traditional territories.

Please contact any member of our Mining and Natural Resources Group for further information on these recent court decisions.