

**Socio-environmental Management Tools
towards the Implementation of Public Policies**



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Overview

- Focusing mainly on the development stage of mining projects as this is the principal period when environmental and community impacts are considered in permitting a project
- In Canada, Aboriginal consultation coexists with statutory law of environmental assessment and regulatory decision-making

Environmental Regulation - Background

- In Canada, mining is regulated at the federal, provincial and territorial levels of government
- These statutes regulate exploration, development, mining and closure activities
- At the exploration certain environmental licences are required but are modest given the limited impact of these activities
 - PDAC has produced its best practices handbook “E3” setting out best practices @ the exploration stage
 - Exploration companies largely self-monitor @ this stage though some government inspection occurs

Environmental Regulation - Development Stage

- Regulations are more complex at the development stage given the impact of activities, though the purpose is still to minimize environmental impact while maximizing the social benefits, including training and employment
 - Key permits typically include land and water use, closure and reclamation plans, though permits also required in respect of fisheries, wildlife and other matters
- A mining lease required to develop a mine
 - typically approximately 20 years in tenure with the opportunity to renew
- Permission to develop a mine is subject to obtaining a favourable environmental assessment (EA) and obtaining required permits

Environmental Regulation - Development Stage

- EA contemplates the environmental impact of mining and mine closure and deals with both federal and provincial requirements
- A baseline environmental survey is generally required
- After the EA process the project may be approved in principle but permits are still required
- EAs are required to in respect of Federal authorizations and provincial permits
- Often Federal and Provincial assessments are combined into one joint panel review

Environmental Regulation - Development Stage

- For example, the Federal process includes determining whether an EA is required, preparing a report, reviewing the report with federal authorities, various departments taking decisions & implementing a mitigation program
- EA process includes obligations to study environmental impacts and socio-economic impacts on Aboriginal peoples
- Aboriginal peoples, and the community @ large, are consulted in the process
- The mining company is responsible for collecting traditional knowledge from Aboriginal people in respect of the EA
 - Traditional knowledge would include historical land uses, wildlife migratory patterns, hunting areas, cultural sites

Environmental Regulation - Development Stage

- Ongoing monitoring is typically a condition of environmental permitting
- Monitoring provides early warning and ensures the environmental plan is being followed
- The mining company provides reports to the government and to the local community
- Local people are often trained to carry out some of the sampling and analysis which backs-up the monitoring

Community Input - Development Stage

- Development is the key stage for community input, including traditional knowledge
- The consultation process is designed to obtain community input
- Communities can be proactive by developing a skills inventory, identifying impacts, identifying labour needs
- Communities may set up committees to review the environmental impact statement and to oversee training, hiring and business development, etc.

Licencing & Permitting

- Leases are provincial other than in the northern territories where they are Federal
- Among other things they set environmental parameters around mine development and operation
- Leases require a mine closure plan, an annual lease fee and a security deposit
- Required permits include in respect of waterways, fisheries, use of explosives, sewage and in some cases transmission

Aboriginal Consultation

- Canadian Courts have held there is a duty to consult with Aboriginal peoples that may have an interest in project areas
- How this consultation interacts with the environmental assessment and regulatory decision making process is still evolving
- In the past several years Courts have established a framework for consultation where Aboriginal rights are not proven and also in a context of known treaty rights

Aboriginal Consultation

- Duty on Crown to consult and seek accommodation
- Aboriginals will be particularly concerned where there are potential negative impacts on traditional ways of life (e.g., hunting, fishing)
- The Canadian constitution (1982) enshrined, without defining, protection of existing aboriginal and treaty rights
- Cases have focused on the nature and scope of these rights
- Supreme Court said to be a protected right an activity must have elements of practice, custom or tradition

Socio-Environmental Management – Aboriginal Peoples

- Courts have recognized rights to hunt, fish or trap but commercial rights have been harder to prove
- Aboriginal title has been recognized and requires satisfaction of 3 criteria
 - Land was occupied prior to sovereignty
 - There is a continuity of occupation
 - @ sovereignty occupation must have been exclusive
 - Occupation means physical occupation
 - Occasional entry and use will not satisfy the tests

Aboriginal Peoples – Duty to Consult

- Very low threshold, crown has knowledge of potential aboriginal right or title
- Scope – duty to consult is proportionate to the strength of the claim and the potential seriousness of the impact
 - For Crown to determine correctly the scope required there needs to be cooperation and an exchange of information
- Crown determines if necessary to reach a workable accommodation
 - consultation process must suggest a need for amending of Crown policy

Aboriginal Peoples – Duty to Accommodate

- Determine what is a reasonable accommodation
- Crown balance societal and aboriginal interests
- Aboriginals do not have a veto over the decision-making process
- Accommodation could include economic compensation or conferral of rights in respect of agriculture or forestry reflecting the prior occupation
- Duty to accommodate is still evolving

Aboriginal Peoples – Duty to Accommodate

- Final stage is a decision by the Crown in respect of the proposed development
 - Crown has a constitutional obligation to make decisions about development, weighing Aboriginal and other societal interests
- Private parties do not have a legal obligation to consult with Aboriginals, BUT, the private party bears the risk if the Crown fails to adequately consult
- Therefore private parties should assist the Crown in carrying out its duty to consult

Aboriginal Peoples – Types of Agreements with Private Parties

- Consultation Agreements
 - Sets out procedure for consultation before discussing substance
- Negotiation Agreements
 - Term sheet or MOU; often non-binding
- Access and Road Use Agreements
- Impact and Benefits Agreements
 - In some case (e.g., North) is required
 - Typically involve comprehensive access and/or support for a project
 - May involve environmental protection and monitoring provisions
 - May include training and employment terms and procurement

Aboriginal Peoples – Types of Agreements with Private Parties

- Settlement Agreements
 - Resolve certain claims or grievances
 - May include monetary compensation and/or changing parameters of a project
- JV Agreements
- Trust Agreement