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Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements

Laura Wright
University of Western Ontario, lwrigh56@uwo.ca

Jerry P. White
University of Western Ontario, white@uwo.ca

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Abstract
The development of resources on and near Indigenous territories has many potential benefits including employment creation, wealth sharing, and improved service delivery. However, the development of oil and gas resources can also lead to economic inequality, displacement, loss of traditional lifestyles, and significant environmental damage. This paper is a review of the how oil and gas development on Indigenous lands and traditional territories has been regulated in Canada to balance these benefits and risks. Some of the legislation discussed include the *Indian Oil and Gas Act*, the *First Nations Oil and Gas and Moneys Management Act*, the *Umbrella Final Agreement* in the Canadian North, as well as unregulated impact benefit agreements between First Nations and industry. These regimes and others are examined in terms of their provisions for environmental protection and meaningful Aboriginal consultation, and is intended to inform discussions on how to improve the policy approach to resource development.

Keywords
economic development, resource development, environmental impacts, social impacts, policy, treaties

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Developing Oil and Gas Resources On or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements

Canada's potential crude oil reserve is one of the largest in the world, second only to Saudi Arabia. Likewise, Canada is also the second largest exporter of natural gas, trailing behind Russia (Davis, 2005). Thus, it is projected that oil and gas activities, including exploration and exploitation, will increase dramatically in Canada (Van Hinte, Gunton, & Day, 2007). These activities may provide immense benefits to local communities and Canada as a whole, but also pose great social, cultural, and environmental risks. Potential benefits include increased employment, as well as stimulation and diversification of the local economy through the establishment and development of local businesses, potentially leading to sustainable economic development (Van Hinte et al., 2007; Sosa & Keenan, 2001). However, the development of oil and gas resources can also lead to economic inequality, inflation, social upheaval, displacement, housing shortages, social tensions, loss of traditional lifestyles, and significant environmental damage (Van Hinte et al., 2007; Sosa & Keenan, 2001). The relative weight of the potential benefits and risks of oil and gas exploitation is balanced through federal and provincial legislation that both facilitate and constrain economic and social development for the communities affected.

Jurisdiction over Natural Resources in Canada

Canada is a federal state with a complex division of jurisdictional power between the federal government and the ten provincial governments. The Constitution Act, 1867, divides powers between these jurisdictions. Pursuant to section 109, the provinces have ownership and jurisdiction over the natural resources within their borders. Section 109 reads:

> All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the province. (Constitution Act, 1867)

Thus, provinces can enact laws governing the management, control, and exploitation of natural resources. However, the federal government does retain authority over natural resources in some of the territories, the continental margin, national parks, and on Indian reservations (Black, 2008). The federal government also has regulatory power through the National Energy Board (NEB), the mandate of which is to regulate international and interprovincial aspects of oil, gas, and electric utilities in the interest of the Canadian public (National Energy Board, 2011).

While, in general, the provinces have jurisdiction over natural resources within their borders, the web of jurisdictional power is complicated in the special case of resource development on First Nations lands. By virtue of the Constitution Act (1867), the federal government has responsibility for legislation concerning "Indians and lands reserved for the Indians." Reserve lands are set apart for First Nations bands and are held by the federal Crown for the collective use and benefit of the entire band. While this is the case for most of Canada, relatively recent land claim settlements in the Canadian North have significantly shifted jurisdictional power over land and resources from the Canadian Crown to First Nations governments. Given the complexity of the jurisdictional web surrounding Canada's Aboriginal peoples, in general, and resource development on Aboriginal land, specifically, a brief discussion of the legal status of Aboriginal rights, title, and treaties is needed to provide the backdrop for a discussion of the shifting relationship between First Nations, government, and industry. This will be taken up in the following section.

Aboriginal Rights: Title and Treaties[1]

Section 35(1) of the Constitution Act, 1982, provides recognition of Aboriginal rights and affirms Aboriginal peoples' interests in traditional lands:

> The existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed. (Constitution Act, 1982)

The constitutional recognition of Aboriginal rights secures their supremacy over any inconsistency in common law, federal legislation, or provincial legislation (barring any limits established by the courts). However, while the Constitution Act (1982) secures Aboriginal rights, it does not create them; Aboriginal rights are inherent, collective rights based on their original occupancy of the land.

Aboriginal rights to land and resources are also intertwined with the notion of Aboriginal title. The Royal Proclamation of 1763 effectively consolidated Great Britain's rule over North America, while recognizing the right of Aboriginal people to occupy their traditional lands. Exclusive jurisdiction over the newly acquired territories in North America was claimed by imperial authorities, which gave the Crown a monopoly on the land transactions between Aboriginal nations. The Royal Proclamation (1763) effectively gave the Crown the sole right of acquiring land from Aboriginal people. An Aboriginal band is prohibited from directly transferring its interest in land to a third party; sales or leases can only be carried out after land has been surrendered to the Crown, with the Crown then acting on the band's behalf. The inalienability of Aboriginal land, except to the Crown, has dramatic implications for resource development on reserve lands, which will be discussed more thoroughly in subsequent pages.

The exclusive right of acquisition given to the federal Crown by the Constitution Act, 1982, and the Canadian Charter of Rights and Freedoms (1982) continues today. The Constitution Act, 1982, is the supreme law of Canada and cannot be overridden by other legislation. Section 35 of the Constitution Act guarantees Aboriginal and treaty rights. Likewise, section 25 of the Charter guarantees that the rights and freedoms contained within are not to construed as to abrogate or derogate from Aboriginal, treaty, or other rights and freedoms, including those that were recognized by the Royal Proclamation (Canadian Charter of Rights and Freedoms, 1982). Until the Charter and the Constitution Act, 1982, came into effect, the Royal Proclamation merely had the force of any other federal act, and as such the rights and guarantees contained within it could be limited, altered, or overridden by any subsequent federal legislation. Aboriginal title, a specific class of Aboriginal right, also exists independent of Canadian legislation. Calder v. British Columbia (1973) confirmed that Aboriginal title is a legal right derived from traditional occupation and use of tribal lands. Moreover, Aboriginal title to land cannot be understood under traditional property laws. It is not like *fee simple*, but is instead a *sui generis* interest in land.

In Delgamuukw v. British Columbia (1997), the court identified the basic characteristics of this interest:

(1) The inalienability of title, except to the Crown in right of Canada;
(2) The origin of that interest stemming from prior occupation;
(3) The collective, not individual, Aboriginal interest in land.

Generally speaking, the issue of Aboriginal title only arises where land has not been the subject of a treaty signed between Aboriginal peoples and the Crown, or where the issue of extinguishment is still a matter of contention. Lands that are not covered by an existing treaty remain open to Aboriginal title claims. On the basis of the methodology adopted in R. v. Van der Peet (1996), the court held that the right of Aboriginal title

[1] This section relies heavily on *Permission to Develop: Aboriginal Treaties, Case Law and Regulations* (2004) by the present author, Jerry P. White, along with Paul Maxim and Nicholas Spence.

must be established by proof of land occupation prior to the assertion of sovereignty by the Crown. Aboriginal title is also an underlying burden on the provincial proprietary interest in lands and resources under section 109 of the Constitution Act, 1867, discussed above. Once Aboriginal title has been established, the Aboriginal nation concerned is not constrained to practice solely those activities on which their title was established, but are free to use their land, including all resources pertaining to it, on an exclusive basis for any purpose that is not completely incompatible with their traditional practices. In other words, activities that would sever the relationship of Aboriginal people to their land would not be justified by Aboriginal title. In practical terms, it is not absolutely clear what this means or how this restriction on Aboriginal title may hinder oil and gas development in the future. Case law is still developing in this area.

Claims of Aboriginal title are generally not an issue when the Crown and an Aboriginal nation have signed treaties, which are treated as legal instruments, and corresponding treaty rights have been established. Treaty rights have also been given constitutional recognition and affirmation in section 35(1) of the Constitution Act, 1982 (see above). Moreover, treaty rights are also protected from the application of provincial legislation by section 88 of the Indian Act (1985). The Canadian courts have held that each treaty is to be treated as unique and is to be governed by public law rules.

Treaties are to be interpreted as solemn exchanges of promises between the Crown and the Aboriginal societies, and the Crown is obligated to fulfill its side of the agreement. R. v. Simon (1985) established a need for treaties to be interpreted in an evolutionary way. For example, Aboriginals are not limited to using traditional weapons when exercising their hunting and fishing treaty rights; technological innovations can be used. This principle of interpretation, recently recognized, may have drastic implications for the re-interpretation of treaties, especially in relation to resource rights. Many of the pre-Confederation treaties make no mention of natural resources, let alone oil and gas specifically, because, at the time of signing, oil and gas were not being developed in Canada. Thus, it is possible that various treaties may be litigated for the purpose of re-interpretation. However, while litigation is still a possibility for pre-Confederation treaties, Aboriginal rights to oil and gas on reserve lands have been legislated and regulated without treaty re-interpretation. The exploration of these legislative and regulatory regimes, and how they have developed, will be the focus of the next section.

In more recent years, settled land claims have created a number of modern day treaties, also called Final Agreements, which explicitly address issues surrounding resource development on settlement land, including First Nation control over land and resources. Modern day treaties, like the Umbrella Final Agreement (1993) in the Yukon and the Inuvialuit Final Agreement (Inuvialuit Regional Corporation, 1987) in the Northwest Territories, give Aboriginal communities jurisdiction over selected lands and guarantee Aboriginal communities meaningful participation in decision-making related to other tracts of land. These agreements represent an exchange of undefined Aboriginal rights, including Aboriginal title to land outside the agreement, for specific treaty rights (Executive Council Office, 2008), which are constitutionally protected under section 35 of the Constitution Act, 1982. While Aboriginal peoples party to these agreements cede their Aboriginal right and title to non-settlement land, if Aboriginal rights are found to be expanded in the future, these newly recognized rights will also be enjoyed by these northern peoples.

In addition to fulfilling the terms of treaties, the federal government also has a fiduciary obligation to Aboriginal peoples. This fiduciary obligation is not extinguished in the case of modern treaties and stems from the Crown's monopoly on transactions involving land held by Aboriginal peoples and has roots in the claims of Aboriginal title and the Royal Proclamation (1763) discussed above. Where the Crown assumes or exercises discretionary power over the rights or interests of Aboriginal peoples, it is under an obligation to protect them in the enjoyment of their Aboriginal rights. In certain circumstances, the provincial Crown is held to the same fiduciary obligations. This relationship is fiduciary when the province places itself in the

position of the federal Crown. This may occur, for example, where the provincial Crown assumes undertakings in a treaty or attempts to infringe on Aboriginal or treaty rights.

Aboriginal and treaty rights are not absolute and may be infringed by both federal and provincial governments if the infringement furthers a "compelling and substantial" legislative objective and is consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples. Interestingly, conservation and management of a natural resource has been found to be a valid justification for infringing on Aboriginal and treaty rights as it is argued to address both Aboriginal and legislative interests. Generally, the Crown has a duty to consult with the Aboriginal peoples to be affected before Aboriginal or treaty rights can be infringed.

The Supreme Court of Canada has recognized and defined the Crown's legal duty to consult Aboriginal groups in a series of decisions and has become an increasingly significant catalyst for change in the relationship between the State and the Indigenous peoples of Canada. The Supreme Court ruling on the Haida Nation v. British Columbia/Taku (2004) case further defined the legal duty to consult, which was found to exist when there is contemplated Crown conduct and a possible adverse impact on a potential or established Aboriginal or treaty right. The Court set out that, much like the Crown's fiduciary duty, the duty to consult and accommodate flows from the Crown's assumption of lands and resources formerly held by First Nations and further affirmed that the Crown must act honorably in its dealings with First Nations. This decision also established that, while procedural aspects of consultation can be delegated to third parties such as industry project proponents, the ultimate legal duty of consultation and accommodation still rests with the Crown.

Subsequent decisions[2] on the legal duty to consult have provided further clarification. In some circumstances, boards or tribunals can carry out consultation activities, but they do not fulfill the Crown's obligation. Treaties, including modern day treaties, do not negate the Crown's obligation to consult, and strategic, higher level decisions, not just individual project applications, may be subject to consultation. The duty to consult can be a burden on either the federal or provincial Crown, depending on which jurisdiction is contemplating the action.

Some provinces, including British Columbia and Alberta[3], have formal policies and procedures established for consulting with Aboriginal groups on issues of land management and resource development on Crown land. In Alberta, the legal duty to consult is more easily triggered because all of Alberta is subject to treaty; where a treaty right or Aboriginal Title is established, a First Nation does not need to establish the initial burden of proof that their rights may be affected. Conversely, in British Columbia, where there is a lack of treaties, and thus a lack of established and clearly recognized Aboriginal rights, the burden of proving that an Aboriginal right or title is potentially being infringed upon is placed on the First Nation.

As the above discussion reveals, resource development on reserve and settlement lands and lands subject to Aboriginal title claims is legislatively much more complicated than development on other lands. The straightforward provincial jurisdiction over natural resources is not tenable for natural resources found on Aboriginal lands for the following reasons:

(a) Reserve lands fall under federal jurisdiction;

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[2] These decisions include West Moberly First Nations v. British Columbia (2011), Little Salmon/Carmack First Nation v. Yukon (2008), Halalt First Nation v. British Columbia (2011).

[3] British Columbia's consultation policy can be accessed at http://www.gov.bc.ca/arr/treaty/negotiating/public.html Alberta's consultation policy can be accessed at http://www.aboriginal.alberta.ca /574.cfm

(b) Aboriginal and treaty rights, including those established through modern day treaties are recognized in the Canadian Constitution Act, 1982, and are, therefore, protected from conflicting provincial legislation;
(c) The federal government has a fiduciary relationship and a duty to consult with Aboriginal peoples.

Consequently, the federal government has passed specific legislation and regulations regarding oil and gas development on Aboriginal lands. The following section will examine this federal regime and how it has evolved to include more First Nation participation. In the final section, suggestions for further legislative developments will be discussed.

Federal Legislation and Regulation of Oil and Gas Development on Aboriginal Lands

The Indian Oil and Gas Act

The Indian Oil and Gas Act (IOG Act, 1985) vests the Department of Indian Affairs and Northern Development with the power to regulate and manage exploitation of oil and gas on "land reserved for the Indians" (s.2). The IOG Act first came into force in April 1977 and, after consultation with oil producing First Nations and the Indian Resource Council (IRC)[4], was amended to reflect the needs of the modern oil and gas industry and to fill existing regulatory gaps (Indian Oil and Gas Canada, 2010). However, while the new IOG Act was passed on May 14, 2009, it will not come into force until the Indian Oil and Gas Regulations (IOG Regulations, 1995) are also amended. At the time of publication, the 1995 IOG Regulations and the 1985 IOG Act are still in effect.

Section 3 of the current IOG Act (1985) provides the Governor in Council with the power to make regulations that

(a) Respect the granting of leases, permits, and licenses for the exploitation of oil and gas in Indian lands, and the terms and conditions thereof;
(b) Respect the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in those lands, and the terms and conditions thereof;
(c) Provide for the seizure and forfeiture of any oil or gas taken in contravention of any regulation made under this section or any lease, license, or permit granted under such regulation; and
(d) Prescribe the royalties on oil and gas obtained from Indian lands.

Furthermore, section 4 of the IOG Act (1985) prescribes "all oil and gas obtained from Indian lands … is subject to payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations." However, section 4(2) allows the Minister to adjust the royalties payable in consultation with council of the band affected. The Minister also has a general duty to consult, on an ongoing basis, the affected First Nations regarding the administration of the IOG Act.

Although not currently in force, several amendments to the IOG Act ("An Act to Amend," 2009) are worthy of comment as they directly relate to the potential for Aboriginal economic development, the applicability of provincial legislation, environmental protections, and the requirement of Aboriginal consultation. As with the current IOG Act, royalties due to the First Nation band are to be paid to Her Majesty in right of Canada in trust. However, the amended IOG Act ("An Act to Amend," 2009) provides more regulatory power to the Minister in Council, specifically power to determine the value of payable royalties, assess the interest to be

[4] The Indian Resource Council is made up of First Nations across Canada with oil and gas production on their land (IRC, 2008).

charged on royalties, and establish administrative fees. Since the IOG Regulations, which are required to put the IOG Act into force, are currently being negotiated, it is not known how the Minister in Council's legislative power over royalty payment will affect the ability of First Nations to benefit economically from oil and gas development.

The amended IOG Act ("An Act to Amend," 2009) also requires

> To the extent that it is practicable and reasonably efficient, safe, and economical to do so, an operator to employ persons who are resident on reserves that include first nations lands on which the exploration and exploitation is being conducted. (S. 4.1(1)(v))

Thus, the new IOG Act has the potential to lead to more sustainable economic development for the First Nations involved through expanded employment. However, without the establishment of effective training programs and culturally sensitive employment practices, the goal of increased Aboriginal employment in the sector is more difficult to achieve. Yet, the need for tertiary services for oil and gas development can support additional employment opportunities and Aboriginal business development. For example, the Fort Nelson First Nation has established construction, catering and other service based businesses in partnership with the Black Diamond Group Limited, providing direct benefits to the community (Waterman, 2011).

The new IOG Act ("An Act to Amend," 2009) also allows for regulations to vary across provinces so that provincial legislation can be replicated at the federal level, and laws and regulations can be harmonized without affecting the jurisdictional spheres of the two governments. However, section 4.2 (4) provides that "regulations made under another Act of Parliament prevail over laws of a province that are incorporated by the regulations made under this Act…" The newly amended IOG Act ("An Act to Amend," 2009) also gives the Governor in Council (the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) and his or her delegates) the power to make regulations "respecting the protection of the environment from the effects of exploration for or exploitation of oil and gas situated in first nations lands…" (S4.1(1)(x)). Finally, although section 6(1) of the current IOG Act requires the Minister to consult with the affected Indian bands on an ongoing basis, the First Nations people to whom this Act may apply have little control over oil and gas exploitation on their lands because the Minister of Indian Oil and Gas is vested with immense discretionary power in this regard. In the amended IOG Act ("An Act to Amend," 2009), section 6 (1.1) is modified by the following stipulations:

> The Governor in Council[5] may, by regulation,
>
> (a) Require that a power of the Minister … be exercised only if prior approval of the council of the first nation is obtained, if the council is first consulted, or if prior notice is given to the council, as the case may be;
>
> (b) Require that any such power of the Minister be exercised only if prior consent is given by any first nation member who is in lawful possession of the first nations lands; and
>
> (c) Require that notice be given to the council of the first nation after the Minister exercises such power.

Thus, depending on the IOG Regulations currently being negotiated, the duty to consult described within the IOG Regulations may be more reflective of the Court's new definition of the Crown's duty to consult with First Nations.

[5] For further clarity, the Governor in Council of Indian Oil and Gas is the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) and his or her delegates.

The Indian Oil and Gas Regulations

The Indian Oil and Gas Regulations (IOG Regulations, 1995) set out the procedures that must be followed by any person seeking to develop oil and gas on land reserved for Aboriginal people. The IOG Regulations provide for exploratory licenses, permits, leases, royalties, drilling monitoring and regulation, surface rights, and other activities related to resource exploitation. The IOG Regulations are administered by the Executive Director of Indian Oil and Gas Canada (IOG Canada, 2010), which is one sector of AANDC. The power bestowed to the Executive Director to grant licenses, permits, or leases in respect of oil and gas on reserve lands is fettered by an obligation to seek the consent of the First Nation council who will be affected by activity on its lands. Relatively comprehensive consultation guidelines are established in the current IOG regulations[6]; however, Aboriginal people are still denied substantial control of oil and gas operations on reserve land. As stated above, amendments to the IOG regulations are currently being negotiated and may potentially mandate more comprehensive consultation requirements and control for First Nations.

Canadian Environmental Assessment Act

Under the Canadian Environmental Assessment Act (CEA Act, 1992), an environmental assessment is required before a federal authority carries out a project or assists in one. Owing to the Crown's fiduciary duty to Aboriginal peoples and because the federal government administers Aboriginal lands, the exercise of Indian Oil and Gas Canada (IOG Canada, 2010) powers, duties, or functions are subject to the application of the CEA Act. These functions include the granting of exploratory licenses, surface rights leases, right of entry, and crude bitumen leases, as well as the amendments to crude bitumen permits or leases. Assessments carried out under the CEA Act (1992) determine the environmental impact that a project may have. Potential effects include the following:

(a) Any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat, or the residences of individuals of that species;
(b) Any effect of any change referred to in paragraph (a) on
    a. Health and socio-economic conditions,
    b. Physical and cultural heritage,
    c. The current use of lands and resources for traditional purposes by Aboriginal persons, or
    d. Any structure, site, or thing that is of historical, archaeological, paleontological, or architectural significance.

The CEA Act (1992) also explicitly states that one of the purposes of the Act is to "promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment" (s.4.1.3). It also requires that the Minister consult with affected First Nations. Moreover, it establishes that Aboriginal traditional knowledge can be considered in assessments.

When both the federal and provincial governments are involved in a project both the CEA Act and the respective provincial Environmental Assessment Acts apply. Cooperation between various provinces and the federal government has also been encouraged through the development of Harmonization Agreements with the provinces of Manitoba, Saskatchewan, Alberta, and British Columbia.

[6] To review the Indian Oil and Gas Regulations, please visit the Department of Justice Canada at http://laws-lois. justice. gc.ca/eng/regulations/SOR-94-753/

Regulated Aboriginal Control over Oil and Gas Development

First Nations Land Management Act

The First Nations Land Management Act (FNLM Act, 1999) was enacted to secure control by First Nations over First Nations lands and the right to govern those lands, communities, and resources. One stated purpose of the FNLM Act is to facilitate economic development in First Nations communities. The FNLM Act only applies to those First Nations who have signed the Framework Agreement[7] and have subsequently established land codes to regulate land use. Land codes establish rules and regulations to follow when managing Aboriginal land through resource development, land transfers between community members, marital breakdown, etc. To date, 29 First Nations are operating under their own land codes (AANDC, 2011). Section 18 of the FNLM Act (1999) gives a range of land management powers to the First Nation signatory, including the powers, rights, and privileges of a landowner. These powers include the following:

- The right to grant interests and licenses in relation to that land;
- The right to manage the natural resources of that land;
- The right to receive all revenue acquired under its land code on behalf of the entire First Nation.

While the establishment of a land code and the subsequent application of the FNLM Act grant the powers of land ownership to the First Nation, the FNLM Act does not alter Aboriginal title to First Nation land, which continues to be set apart for the use and benefit of the First Nation. That is, the land still falls within federal jurisdiction as established in the Constitution Act, 1867.

The IOG Act (1985) still applies to any First Nation that was subject to the IOG Act prior to the relevant land code enactment, irrespective of any interest in First Nation land that was granted to the Crown for the exploitation of oil and gas pursuant to a land code. In the case of inconsistencies between a law established by a First Nation under the FNLM Act and a federal law, the federal law is supreme.

The FNLM Act was one of the first pieces of legislation to establish sectoral self-government for First Nations (Black, 2008). In this capacity, the FNLM Act can be seen as a step toward increased First Nation control over lands and natural resources when legislation and regulations are considered successively. This recognized need for First Nation control over land and resources arguably facilitated the creation of the First Nations Oil and Gas and Moneys Management Act (FNOGMM Act, 2005), which provides First Nations with further control over land and moneys and replaces the IOG Act for those Nations who are signatories. The FNOGMM Act is an additional step towards First Nation control in this progression of legislation.

First Nations Oil and Gas and Moneys Management Act

The First Nations Oil and Gas and Moneys Management Act (FNOGMM Act, 2005) has two major purposes. The first is to allow participating First Nations to manage and control moneys that would otherwise be held by Her Majesty in right of Canada on the First Nations' behalf. The second is to provide participating First Nations with the power to manage and control oil and gas resources on reserve land. There are two separate processes required for the transfer of the respective powers from the federal government to the First Nation. Both processes begin with a First Nations council submitting a written resolution to the Minister requesting accession into one or both regimes. The Blood First Nation is a signatory to the land management regime of the FNOGMM Act, but has not ratified a moneys management resolution.

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[7] To review the Framework Agreement in its entirety visit the First Nations Land Management Resource Centre website at http://www.fafnlm.com/documents/Text-of-the-Framework-Agreement-on-First-Nation-Land-Management.pdf

The process to accede to the moneys management regime is initiated when the council of the First Nation, in a written resolution to the Minister, requests payment of the moneys currently held and any future moneys that would be held, on its behalf by Her Majesty for the use and benefit of the First Nation. The First Nation has the ability to amend the financial code, but it must prepare a financial code specifying how the moneys are to be held and expended and also provide for accountability and procedures in case of a conflict of interest. Transferred moneys can either be held at a financial institution or placed in a trust. Provincial laws will apply to a trust established to hold transferred moneys. The next step in the process entails gaining the approval of the majority of band members to accede to the regime. Once approval is obtained, the First Nation can be added to Schedule 2 of the FNOGMM Act (2005), after which "the moneys held by Her Majesty for its use and benefit shall be paid to the first nation out of the Consolidated Revenue Fund …" (S. 30 (1)).

For the transfer of power over oil and gas development, the First Nation is required to submit a written resolution indicating interest in acceding to the regime. Then an oil and gas code must be prepared that delineates the procedures to be followed after the transfer, including issues regarding ensuring accountability, addressing possible conflicts of interest, coordinating with other First Nations, and allowing for the code to be amended. Once these codes have been prepared, a transfer agreement may be finalized between the First Nation and the Minister, but this agreement may be subject to approval by the majority of the band affected by the application. After an affirmative vote, the Governor in Council may add the First Nation's name to Schedule 1, effectively transferring the First Nation from the current IOG Act and FNLMA Act regime into the FNOGMM Act regime. That is, when a First Nation assumes control over land and moneys under the FNOGMM Act, the IOG Act and the FNLM Act no longer apply. Thus, the federal government's explicit power over oil and gas development on First Nations land in the IOG Act, (albeit with the requirement to consult with First Nations) is replaced by First Nation control over such development by the FNOGMM Act, which provides power to the Nation involved to make regulations.

After the transfer date, "any designations made under the Indian Act in respect of oil and gas cease to have effect, and the rights and obligations of Her Majesty… are superseded by the rights and obligations of the First Nation …" (FNOGMM Act, 2005, S. 23(3)). While accession to the FNOGMM Act does provide First Nations with increased managerial powers over oil and gas development, the Act does not affect Her Majesty's title to any Indian lands. That is, the lands continue to be set apart for the use and benefit of the First Nation and remain inalienable. Nor does the FNOGMM Act affect the application of the Indian Act as it relates to areas other than oil and gas.

The FNOGMM Act (2005) grants the participating First Nation the powers, rights, and privileges of an owner in relation to oil and gas on the managed lands (S. 34 (1)). It has the powers to enact laws relating to oil and gas exploration, exploitation, and payable royalties with a few important caveats. First, these laws must not be related to matters "coming within the exclusive jurisdiction of a provincial legislature…" (S. 35 (1)). Second, while the First Nation is vested with the power to protect the environment and to conduct the required environmental assessments, these laws must "provide protection for the environment that is at least equal to that provided by the laws of the province" (S. 38) and First Nation conservation laws must not be inconsistent with provincial conservation laws. Moreover, Section 56 also states that "in the event of a conflict between a first nation's oil and gas laws and any federal law providing for the environmental assessments … the federal law prevails."

To date, three First Nations have acceded to the FNOGMM Act: the White Bear, the Blood, and Siksika First Nations. The Act was officially described as "a key step in building stronger and more self-reliant communities" (Indian and Northern Affairs Canada (INAC), 2005).

Unregulated Aboriginal Control over Oil and Gas Development

Impact Benefit Agreements

While the FNLM Act and the FNOGMM Act provide First Nations with increased control over oil and gas development through formal legislation, unregulated agreements between various First Nations and oil and gas companies are becoming more prevalent. These agreements are variously called Impact Benefit Agreements (IBAs), Community Agreements, or Protocol Agreements[8], and they serve to create a formal contract between the parties to facilitate economic benefits for the First Nation, as well as to mitigate the negative consequences of resource development, including adverse environmental, social, cultural, and economic effects. IBAs typically provide a structure for the negotiation of issues, such as royalty and lease payments, Aboriginal employment, business development, environmental management, and the maintenance of culture and cultural heritage. IBAs are not regulated and, thus, can vary greatly from case to case.

These agreements can be seen as a form of consultation and accommodation between industry and the affected First Nations. They can be beneficial for both parties. For industry, local support for a project can ease regulatory processes; agreements can create cost certainty regarding community investment funds; and companies can benefit from the recognition that comes from being socially responsible. Benefits for First Nation communities can include, among other things, upfront financing for businesses and infrastructure, employment and contract opportunities, and increased participation in decision-making. The terms included in an IBA may result in more opportunities for economic development than would be provided by existing legislation, especially under the IOG regime. However, since IBAs are not regulated and are kept confidential; individual First Nations are largely unaware of the potential benefits that could be included or those that have been included in other agreements with different First Nations. Thus, industry may be in a more advantageous bargaining position.

IBAs are a form of consultation between industry and the affected First Nation; however, the creation of an agreement does not negate the Crown's duty to consult with the First Nation. The Crown may delegate the procedural aspects of consultation to industry, which may be fulfilled through the negotiation of an IBA, but the Crown is still responsible for the substantive duty of consultation. Since the Crown is not party to these bilateral agreements, it is currently difficult to determine when or if the Crown's duty to consult has been fulfilled. Essentially, IBAs represent accommodation without official Crown consultation. Thus, while IBAs hold great potential to increase the benefits of economic development for First Nations involved in oil and gas development, increased Crown involvement, including potentially regulating IBAs or providing First Nations with access to existing agreements, would increase this potential.

Capacity is another factor that may limit the ability of a First Nation to benefit from an IBA or other form of consultation. Limited financial and human resources, as well as a potential lack of familiarity with the process, can hinder meaningful consultation. IBAs may include capacity development funds, but ensuring that First Nations have the capacity to consult in a meaningful way is a major component of the Crown's duty to consult. Therefore, opportunities for capacity building should be ensured either through bilateral agreements between First Nations and industry or federally funded programs.

[8] There are a variety of different titles for various agreements between industry and First Nations. The nomenclature is not standardized across the industry or Canada.

Oil and Gas Development in the Canadian North

As previously stated, Canada is a federal state with a complex division of jurisdictional power between the federal government and the ten provincial governments, as well as territorial governments. There are three territories in Canada: the Yukon, the Northwest Territories, and Nunavut. This paper will discuss oil and gas development in the Northwest Territories and the Yukon, specifically, to illustrate the complexities of Arctic hydrocarbon development. An examination of the Northwest Territories is particularly pertinent because recent discoveries of oil and gas have necessitated a reconsideration of the legislative and regulatory frameworks governing development.

Northwest Territories

Unlike provincial governments who own provincial land, public land in the Northwest Territories is vested in the Crown in right of Canada for the benefit of Canada, not for the benefit of the territory (Bankes, 2000). Moreover, the government of the Northwest Territories has more limited lawmaking powers than the provinces. These powers in practice can be very broad, but they are not exclusive powers of the territory. The government of the Northwest Territories, however, does have policy interests in protecting the environment and ensuring that development activities benefit the residents of the Northwest Territories economically and socially (Erlanson & Associates, 2002). What makes this jurisdictional division more complicated are the three settled land claim agreements in the territory that are constitutionally protected. These include the Inuvialuit Final Agreement, 1984 (IFA), the Gwich'in Final Agreement, 1992, and the Sahtu Dene and Métis Agreement, 1993 (Bankes, 2000).

The Inuvialuit Final Agreement and on-shore development. The IFA was signed by the federal government and the Committee for Original People's Entitlement representing the 2,500 Inuvialuit of the western Arctic in 1984 (Inuvialuit Regional Corporation, 2007). Under the Agreement, the Inuvialuit gave up any claim to the lands in the western Arctic in exchange for legal title to selected lands, financial compensation, and a variety of other rights. The agreement was given the force of law by the Western Arctic (Inuvialiut) Claims Settlement Act (1984). The IFA established the Inuvialuit Settlement Region (ISR), which extends into the marine waters in the Beaufort Sea and stretches from the Alaska and Yukon border north to the 80th parallel of latitude and sound on longitude 110° to the Northwest Territories and Nunavut border (Erlanson & Associates, 2002).

There are several different land classifications within the ISR, each with separate regulatory regimes. Lands classified as 7(1)(a) are owned by the Inuvialuit fee simple and include absolute rights to subsurface resources, including oil and gas. Lands classified as 7(1)(b) are also owned by the Inuvialuit fee simple, but do not include rights to subsurface resources (Sloan, Sloan, & Associates, 2001). There are also Crown lands within the ISR that are not owned by the Inuvialuit, but are still subject to the IFA. Parts of the inland area of the ISR and all of the off-shore areas are classified as Crown land. In terms of resource activities, significant features of the IFA include[9] the following:

(a) A role for Inuvialuit in Environmental Screening and Review of development proposals in the ISR that are likely to cause a negative environmental impact (although the CEA Act still applies to the ISR);
(b) Assured opportunities for Inuvialuit to participate in economic activity in the ISR;
(c) A high priority for protection of wildlife, habitat, and the environment, and a requirement for compensation for any damage caused.

[9] This list is adapted from Erlanson and Associates (2002).

Gas and oil rights in lands classified as 7(1)(a) are granted through the Inuvialuit Regional Corporation (IRC), which is the institutional representative of the Inuvialuit people (Sloan et al., 2001). Before any rights are granted, the IRC requires developers to enter into a Participation and Access Agreement that ensures the protection of wildlife, the promotion of education, training and employment of the local people, an obligation to share information, a provision for the costs of ILA inspections, and fair compensation for access to the land and rental fees (Sloan et al., 2001). However, there has been little development in these lands since these regulations were enacted, so there are few examples to date.

Oil and gas rights in lands classified as 7(1)(b) and in Crown lands are granted though the Canadian Petroleum Resources Act (1985), which is administered through AANDC and given final authorization by the NEB through the Canada Oil and Gas Operations Act (1985) (Sloan et al., 2001). However, the NEB requires developers to enter into a Benefits Plan before development can occur. A Benefits Plan is intended to ensure that the developers consult with the Inuvialuit, maximize employment, training, and secondary business opportunities, and provide compensation for any damages to wildlife (Sloan et al., 2001). A guideline provided by the NEB suggests that developers (a) support regional business to maximize the short and long term benefits for the North, and (b) remove barriers to employment by granting local residents top priority in hiring and by identifying and optimizing training opportunities (Sloan et al., 2001).

Regardless of how the land in question is classified, developers are mandated through the IFA to undergo extensive consultation with the Inuvialuit people, in general, and either the IRC or the NEB, in particular. This consultation process is beneficial for both the Inuvialuit and the developers. The Inuvialuit largely view oil and gas development as a promising source of economic development that can create primary and secondary employment opportunities; thus, many are supportive of development. However, risks posed by development to harvesting, culture, traditional land use, wildlife, and the environment are also of concern. From the Inuvialuit perspective, having consultations between concerned parties and establishing agreements can help ensure that the benefits and risks of development are balanced (Sloan et al., 2001). From the developers' perspective, consultation is beneficial because building a good working relationship with the community can facilitate development. That is, communities can be a source of labor, services, and information. Moreover, establishing a relationship with mutual trust and respect can lead to smoother and timelier authorization processes (Sloan et al., 2001). The consultation process required in the Canadian North is being implemented increasingly on a voluntary basis in the rest of Canada through IBAs – another indication that these kinds of agreements have the potential to be beneficial to all parties involved.

Yukon: The Umbrella Final Agreement

In 1993, the Yukon First Nations, represented by the Council for Yukon First Nations, entered into an agreement with the federal and Yukon governments. The Umbrella Final Agreement (UFA, 1993) provides a template for the negotiation of Final Agreements for the 14 individual First Nations in the Yukon. Much like the IFA, the UFA represents an exchange of undefined Aboriginal rights and title for defined treaty rights on selected portions of land within the Yukon. All First Nations Final Agreements include the provisions of the UFA, but they may also include specific provisions related to the unique circumstances of individual First Nations. Once signed, Final Agreements are considered land claims agreements and are thus constitutionally protected.

The total amount of Settlement Land subject to the UFA to be divided among 14 First Nations is nearly 41,500 square kilometers, or roughly 9% of the Yukon (UFA, 1993). Settlement Land was selected in consultation with the Yukon First Nations and is representative of the geography and resource potential within each First Nation's Traditional Territory (UFA, 1993). This land is further divided into Category A

Settlement Land and Category B Settlement Land. In the case of the former, the First Nation has "the rights, obligations and liabilities equivalent to fee simple…" (UFA, 1993, s.5.4.1.1) with fee simple title to subsurface resources including oil and gas. In the case of the latter, the First Nation enjoys the equivalent of fee simple ownership over the surface of the land only; the Yukon government retains subsurface rights. In Category A Lands, the First Nation has management powers similar to those of the Yukon government; the First Nation is responsible for granting leases and permits and collects the royalty payments for the resources exploited in this area. The jurisdictional breakdown on Category B lands is more complicated, since there is potential for conflicts of interest between surface uses (enjoyed by the First Nation) and subsurface uses (enjoyed by the Yukon government). In anticipation of this potential conflict, Chapter 8 of the UFA established a Surface Rights Board composed of an equal number of persons nominated by the Yukon and by the Yukon First Nations to solve disputes over access and land use.

Another feature that makes the UFA particularly efficient is the call for the establishment of a comprehensive environmental assessment process that applies to all lands in the Yukon. The Yukon Environmental and Socio-Economic Assessment Act (YESA Act, 2003) is the product of consultation between the Yukon government and the Council of Yukon First Nations. This Act has functionally replaced the CEA Act in the Yukon and provides a high level of transparency, guaranteed opportunities for First Nation participation, First Nation representation on the assessment board, the inclusion of traditional and local knowledge in assessments, and provision for a broad consideration of socio-economic factors (YESA Act, 2003). For projects based on Category A or B Settlement Land, the First Nation is explicitly recognized as the decision-making body. Even when not on Settlement Land, consultation between industry and the affected First Nation is required for projects on Crown land (YESA Act, 2003). Thus, the YESA Act provides Yukon First Nations with a major influence on developments both within and outside Settlement Land and Traditional Territory. It can also be seen as an effective apparatus through which the Crown can fulfill its legal duty to consult.

The collaboration between the Yukon government and the Council of Yukon First Nations is continuing with negotiations concerning the establishment of a common regulatory regime for oil and gas development. Since the Yukon First Nations own the oil and gas resources on Category A Settlement land they are recognized as key players in the formulation of these regulations. The Yukon Oil and Gas Act (YOG Act, 2002) is the nucleus of this regime, and it applies to all operations in the Yukon, both Settlement land and non-Settlement Land. If an oil or gas development project is to be conducted exclusively on Yukon First Nation Settlement Land, specific legislation passed by the First Nation can be applied to that activity; however, to date, no Yukon First Nation has done so. This may be an indication of First Nation satisfaction with the existing regime, but this may change in the future as oil and gas projects develop in the area.

The YOG Act (2002) requires a benefits agreement for all projects with estimated costs over $1 million in the Yukon. Unlike benefits agreements in the provinces, which are entered into voluntarily and are unregulated, benefits agreements in the Yukon are required to identify employment, training, and business opportunities for Yukon First Nations and other residents of the Yukon affected by the oil and gas activity. Also, unlike benefits agreements in the provinces, agreements in the Yukon include the Yukon government in negotiations, which creates confusion over whether the agreements fulfill the Crown's duty to consult.

The legislative and regulatory regime related to oil and gas in the Yukon seems to be the most effective when compared to the other regimes discussed in this paper. However, the Yukon regime is relatively recent and the practical outcomes have yet to be fully assessed. Analyses of the economic and social benefits reaped by the Yukon First Nations should be conducted as oil and gas projects develop. This paper will conclude with a discussion of the progression evident in the series of oil and gas regimes discussed earlier.

Conclusion: The Evolution of Oil and Gas Regimes and Suggestions for the Future

The IOG Act (1985) is by far the least evolved of the regimes discussed in terms of guarantees for Aboriginal participation and control over oil and gas activities. In this regime, the federal government is responsible for granting licenses and interests to resources on Aboriginal lands, and the federal government holds any monies generated from such development in trust for the band. In its original formulation the IOG Act was largely inconsistent with the Crown's duty to consult, which has been established and clarified by the Courts since the original legislation came into force. The amended IOG Act (2009) appears to be a better conduit for the Crown's duty to consult and also has the potential to increase the economic benefits reaped by First Nations through the explicit promotion of Aboriginal employment opportunities in oil and gas projects. However, until the new IOG Regulations are passed, it is unknown how effective this regime will be at balancing the risks and benefits of development for First Nations and how much control they will be able to exercise in decisions relating to the exploitation of their reserve land.

The FNLM Act (1999) represents a step towards First Nation control over lands and resources. In general, First Nation signatories to the Act have the same privileges over their reserve lands as landowners, including the ability to grant licenses, collect rent, and manage most natural resources. However, in terms of oil and gas specifically, the IOG Act still applies to reserve lands. Thus, while recognizing the need for increased First Nation control over land and resources for economic development, the FNLM Act still denies First Nations strong decision-making power over oil and gas developments. The FNLM Act does not facilitate the Crown's duty to consult any further than the IOG Act does.

The CEA Act (1992) applies to projects proposed under the IOG Act. The CEA Act allows for the inclusion of Traditional Knowledge in assessments, considers not only environmental but social-economic effects of development, and promotes consultation with affected First Nations. However, First Nations do not have decision-making authority; they are not guaranteed representation on the assessment board.

The FNOGMM Act (2005) can be considered the most progressive regime in the Canadian provinces. Under the FNOGMM Act, First Nations are empowered to create their own environmental assessment protocols. Signatory First Nations can hold their own moneys, have the privileges of landowners over their reserve land, and have the ability to meaningfully control their land and resources, including oil and gas. A participating First Nation can establish its own legislation and regulations regarding oil and gas development and environmental assessment and, thus, can decide for itself if the balance of benefits and risks of oil and gas development is favorable.

The oil and gas regimes in the territories are slightly different from those in the provinces by virtue of the more complicated jurisdictional web that includes the federal government, the territorial governments, and the Final Agreements settled in the region. However, it appears that the territories have turned this potential challenge into an opportunity for increased Aboriginal control over resources on and off settlement lands. The IFA in the Northwest Territories (IRC, 1987) and the UFA (1993) in the Yukon both establish Aboriginal ownership of specified lands that is equivalent to fee simple, including the subsurface resources, such as oil and gas. On these lands, the Aboriginal groups have nearly complete control over development decisions, which has the potential to promote economic development while also allowing the group affected to determine if the risks posed by development are offset by the benefits.

Consultation is guaranteed by both Final Agreements through mandatory benefits agreements and participation in environmental assessments; however, the extent of the consultation varies between the two regions. While the IFA guarantees a role for the Inuvialuit in the environmental screening process, the UFA provides a stronger guarantee of meaningful consultation because the Yukon First Nations have played a key

role in the development, and not just the execution, of the YESA Act (2003) and the YOG Act (2002). Moreover, both Final Agreements require benefits agreements for large-scale projects. In the Northwest Territories, these agreements are bilateral, involving the Aboriginal group and industry; whereas, in the Yukon, these agreements are trilateral and also include the Yukon government. As such, it appears that the latter may be a better vehicle for the fulfillment of the Crown's duty to consult.

Increased Aboriginal control over decisions relating to oil and gas development on reserve, settlement, and traditional lands has the potential to lead to more sustainable economic development through increased primary and secondary employment opportunities and royalty payments. Moreover, the negotiation of IBAs has the potential to strengthen communities through industry funding of various programs, such as youth-elder connection projects, the building of community centers, and the creation of language revitalization programs. However, while Aboriginal communities may benefit from oil and gas development, there are potentially great environmental risks and adverse impacts on their ability to exercise their Aboriginal and treaty rights. Increased Aboriginal control over development decisions, combined with appropriate structures to facilitate meaningful trilateral consultation among Aboriginal groups, the Crown, and industry, will allow communities to weigh these risks and benefits and make decisions appropriate for their unique circumstances, histories, values, and goals.

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