Mining Act Surveys and the Duty to Consult and Accommodate Aboriginal Peoples[1]

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Abstract: Surveyors may be called upon by mining proponents at various points in the Mining Act procedures, as part of the requirements for securing the appropriate authorizations for mineral exploration and development. Aboriginal law has developed to require Aboriginal peoples to be "consulted and accommodated" if their rights may be impacted. For example, hunting rights often exist throughout a First Nation's treaty or traditional territory (i.e. far beyond the limits of reserves), and the duty to consult and accommodate can be triggered by mining exploration and development. The Crown's "duty to consult and accommodate" Aboriginal peoples has become a central theme in the discussion of natural resource development in Canada. In response to various decisions of Canadian courts, the federal government as well as many provincial and territorial governments have incorporated consultation provisions into legislation. The Government of Ontario significantly overhauled its Mining Act in 2009 to provide for some consultation with Aboriginal communities. Those changes came in to effect in the spring of 2013. This paper will describe the constitutional duty to

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[1] A word about terminology. We speak of the duty owed to "Aboriginal peoples" (plural), or to an Aboriginal people, when speaking generally about the duty. This is both consistent with how the Supreme Court of Canada has articulated the duty, and with the social and political reality that that there are many different Aboriginal nations in Canada. More precisely, however, the duty is owed to the appropriate rights-bearing bodies, which are often local Aboriginal political entities with some form of government. Such an entity may be only a part of a larger Aboriginal nation. A First Nation typically is such a rights-bearing body, and sometimes we use First Nations as examples. Of course, not all rights-bearing bodies are First Nations – Métis and Inuit peoples also have Aboriginal rights. The Ontario *Mining Act* and regulations refer to such local rights-bearing entities as "Aboriginal communities", and in speaking in the context of this legislation, we use that terminology.

consult as it has been described and elaborated on by courts in Canada, and will specifically discuss Ontario's attempt to respond to its duty to consult by amending the Mining Act regime. Finally, the paper will consider the flaws in the Mining Act and the reasons that exploration companies and surveyors working for them should be prudent and pro-active when undertaking intrusive activities in the traditional territories of Aboriginal peoples.

THE ROLE OF SURVEYORS UNDER THE *MINING ACT*

The default under Ontario's *Mining Act*[2] is that Crown land is open for prospecting and claim-staking. Anyone with a prospector's license is entitled to prospect and stake claims on Crown land, regardless of whether that land has been surveyed or not. In the *Mining Act* context, surveyors will be involved either during the claims staking process prior to the claims being registered by the Crown, or after the claims have been registered, before the company applies for a mining lease of the property. The activities performed by a surveyor can include cutting gridlines, clearing trails, and planting stakes. These activities will generally have low potential of impacting Aboriginal or treaty rights but, depending on the context, can result in breaches of those rights, with legal and practical consequences. A survey also makes possible exploration and development activities of mining companies that likely have greater impacts on Aboriginal or treaty rights.

THE MINING CONTEXT

The inescapable context is that mining exploration and development is almost always carried out in areas subject to constitutionally protected treaty or Aboriginal rights. If exploration is attempted without due regard to treaty and Aboriginal rights, there will be legal and practical consequences.

There are a number of Aboriginal rights that may be relevant, and could be impacted by mining exploration or development. There is almost always an Aboriginal right to hunt, fish, trap or gather in an Aboriginal people's traditional territory. Such a right might also be guaranteed by a treaty. There could also be a claim to Aboriginal title (a property right, which encompasses mineral rights where it exists).

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[2] R.S.O. 1990, c. M. 14

In some cases Aboriginal territories overlap, so there may well be multiple Aboriginal peoples who could be affected.

THE PRACTICAL RESPONSE TO THE MINING CONTEXT

More enlightened mining companies recognize the need for a "social licence" in general. That is, they realize that attempting to mine in the face of opposition from local people is fraught with problems, and that it is good business to seek the support of local people, both to avoid difficult legal and practical problems and because local people can often provide goods and services needed by mining companies.

This aspect is greatly amplified in the case of Aboriginal peoples, since there often are enforceable Aboriginal legal rights that could be asserted, perhaps resulting in a project being derailed if such rights are not respected. Beyond just avoiding legal and practical problems, however, it can just be good business, for example, to have a First Nation "on-side". In some cases, that could open up new sources of funding and a pool of potential contractors and employees.

The Prospectors and Developers Association of Canada (PDAC) grasped this reality almost a decade ago when it formed an Aboriginal Affairs committee. It has since provided leadership to the industry with its "E3" (Environmental Excellence in Exploration) standards, and with the newer "E3 Plus" Framework for Responsible Exploration, which give guidelines for engagement with Aboriginal peoples. PDAC also reached a Memorandum of Understanding with the Assembly of First Nations in 2008, and elected an Aboriginal President in 2012.[3]

As of February 2013, Natural Resources Canada reported 198 agreements between mining companies and aboriginal communities or governments.[4] Despite the prevalence of this practice, some mining companies have acted on the view that there is no need to engage with Aboriginal peoples, sometimes leading to litigation. It was in response to such legal conflicts that Ontario amended the *Mining Act* to move away from the "free entry" system, as explained below.

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[3] See www.pdac.ca/programs/aboriginal-affairs

[4] See http://www.nrcan.gc.ca/minerals-metals/sites/www.nrcan.gc.ca.minerals-metals/files/files/pdf/abor-auto/aam-eac-e2013.pdf

A surveyor called in to survey boundaries of mining claims should be aware of the legal and practical risks if Aboriginal peoples have not been adequately consulted and accommodated.

THE LEGAL RESPONSE TO THE BROADER RESOURCE DEVELOPMENT CONTEXT – THE DUTY TO CONSULT AND ACCOMMODATE

Background

The duty to consult and accommodate Aboriginal peoples when decisions are made that may affect their rights, interests or way of life has become a key principle of Aboriginal law, which has resulted in a large and growing body of law.

It has long been established that if a Crown action or legislation results in a *prima facie* infringement of a treaty or Aboriginal right, the Crown must "justify" that infringement if the action or legislation is to stand and be applicable. Part of the "justification" analysis includes an inquiry into whether the Aboriginal peoples in question were properly consulted.

The Crown also has a duty to consult with and accommodate Aboriginal peoples in respect of decisions that may affect lands to which they are asserting rights, even if those rights have not yet been "proven".[5] This duty flows from the Honour of the Crown, which has become a key concept in Aboriginal law, leading to different rights and duties in different circumstances. The duty to consult and accommodate Aboriginal peoples is in fact independent of their substantive Aboriginal or Treaty rights.[6] The duty is both procedural (the Crown must follow the appropriate consultation procedures), and substantive (the Crown must make a decision which accommodates Aboriginal concerns, balancing them fairly with other societal interests).

Threshold Issues About the Duty

The duty to consult and accommodate arises when the Crown knows or ought to know that Aboriginal rights or title may exist, and is considering action that may adversely affect such rights or title. To be meaningful, consultation and accommodation has to take place at the level of strategic resource use planning, not just at an implementation level. The Courts have also

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[5] *Haida Nation v BC (Minister of Forests)*, [2004] 3 SCR 511 ("*Haida Nation*")

[6] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388.

made clear that the threshold for triggering a duty to consult and accommodate is quite low, and that any impact on Aboriginal interests need not be obvious.

The Content of the Duty

In sketching out the content of the duty of consultation, in *Haida Nation*, the Court ruled that there was a spectrum of consultation activities that might be required, ranging from discussing decisions to be made to securing the consent of the relevant Aboriginal peoples.

At one end of the spectrum of consultation and accommodation are cases where the "claim to title is weak, the Aboriginal right limited or the potential for infringement minor". In such cases, the duty would amount to a requirement to "give notice, disclose information, and discuss any issues raised in response to the notice". Even at this level, however, the discussions have to be undertaken "in good faith, and with the intention of substantially addressing" Aboriginal concerns. There must be a meaningful opportunity for consultation – not just an exercise in listening to and then ignoring concerns.

At the high end of the spectrum, where the claims were relatively strong, and that the potential adverse effects of the decision in question were relatively serious, formal participation in the decision-making process and the provision of written reasons might be required. For serious impacts on proven rights, consent of the relevant Aboriginal peoples might be required.

There is a large and rapidly growing body of jurisprudence on the content of the duty to consult and accommodate. Some of the factors considered near the higher end of the spectrum include the provision of capacity funding to Aboriginal peoples to participate in consultation, and the provision of profit sharing or an equity stake in the project.

Who Owes the Duty

The duty applies to both Federal and Provincial governments. The duty to consult and accommodate arises out of the reconciliation of Crown sovereignty with prior Aboriginal occupation, and therefore, according to the Court, there is no obligation on parties other than the government to consult and accommodate. The Crown may, however, delegate procedural aspects of consultation to corporations, as is done in environmental assessments, and increasingly in other contexts. Even in the absence of such delegation, as a practical matter, resource development corporations or other third parties may find it wise, from a business

perspective, to consult with and accommodate Aboriginal peoples. Resource developers have a vested interest in the consultation and accommodation being done properly, since if it is not, the approvals on which their projects depend may be quashed on judicial review. Further, practically speaking, it is sometimes only such "third parties" who may have the depth of knowledge required to provide the information needed in the consultation process, or who can negotiate any changes to the project that might be required for accommodation of the relevant Aboriginal rights or interests. Many project proponents now recognize this and negotiate directly with Aboriginal peoples who might be affected, sometimes even before approaching the Crown for the approvals they need. Having a First Nation "on side", for example, would indeed facilitate the approval process, since the need for further consultation and accommodation would be minimized. This is of significance for surveyors, who, for example, will often be "on the ground" on the mining claims and possibly interacting with members of a First Nation; if a First Nation's initial interaction with a mining exploration company is to find its contractors conducting intrusive activity in its traditional territory without notice, it sets a bad tone to the relationship.

Moreover, while the law is clear that, unless delegated, third parties do not have the Crown's constitutional duty to consult, there is much less legal certainty with respect to liability for the breach of an Aboriginal or Treaty right. Indeed from a legal perspective, while there is not yet any legal precedent for this kind of liability there is no reason why a private party could not be found to be in breach of an Aboriginal or Treaty right. Aboriginal and treaty rights are not found in the *Charter* but in another part of the Constitution. This is significant because while the *Charter* explicitly states that it applies only to government actors, Constitutional rights found outside of the *Charter* are not so confined.[7] Therefore, private entities might be liable for violating those rights. Early consultation and accommodation is the most effective way for a company to avoid breaching any Aboriginal or Treaty rights and to avoid any possible resulting legal liability.

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[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11., s. 32

THE LEGAL RESPONSE IN THE *MINING ACT* CONTEXT

In recent years there have been numerous confrontations involving First Nations, in the Courts and on the ground, concerning mining developments. The background to this is the "free entry" mining regime which has been in place in many Canadian jurisdictions. Typically, under these regimes, any licensed prospector may "stake" a claim on Crown land (and in many instances, on private land, since it is often the case that the owner of the soil has no mineral rights below the surface). Once a claim is staked, that gives the prospector the exclusive right to explore for minerals. This right even permits the prospector, in many cases, to access and use the surface in priority over the rights of a private owner of the soil, if there is one. Underlying such regimes is an attempt to encourage active mineral exploration. In fact under most such regimes the holder of the mining claim is under an *obligation* to undertake exploration work in order to maintain the claims. A staked mining claim is treated as a vested right, and under the statutory schemes, if there are favourable results of exploration, the claims can be converted to stronger forms of tenure. There is typically virtually no discretion or decision to be made by governments in this process. Thus, a prospector, virtually unilaterally, can create his or her own vested rights, and convert them to stronger forms of tenure, leading up to outright ownership of mineral rights. There is little or no room in the process for consideration of whether mining is appropriate socially or environmentally in that particular location. The assumption of the drafters of these legislative schemes, historically created by mining legislation in most Canadian jurisdictions, apparently was that mining was self-evidently the highest and best use of land.

Interacting with mining law regimes are environmental law, land use planning, and Aboriginal rights, which bodies of law have very different underlying assumptions.

The duty to consult and accommodate Aboriginal peoples is a duty which must be met. Courts have sent very strong signals that the Crown cannot make the duty to consult and accommodate vanish by divesting itself of discretion.[8] In the context of free entry mining regimes, if they are structured in such a way that no opportunity is available for consultation and accommodation prior to exploration activities proceeding on the ground, such a legislative scheme is

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[8] See *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 63.

unconstitutional.[9] The lack of clarity surrounding the duty to consult under the "free entry" mining regimes (i.e. which party is responsible for the duty in that context, when is the duty triggered, etc.) has led to litigation in which First Nations have claimed against proponents and the Crown, often seeking and obtaining injunctive relief restraining exploration activities.[10] More recently it has led to claims by corporate proponents, such as those commenced by Solid Gold Resources and Northern Superior Resources, against the Crown for failing to fulfil its duty to consult. These companies are claiming that they have lost business opportunities as a result of the Crown's alleged failure to consult because they were unable to work their claims due to disagreements with First Nations. These situations create obvious uncertainty in the mining sector.

In response to these various legal challenges, Ontario has now made significant changes to its mining legislation, discussed below, which move the legislative scheme away from the "free entry" system.

THE ONTARIO LEGISLATIVE CHANGES

In 2009 Ontario passed the *Mining Amendment Act*.[11] However, the majority of the changes to this regime did not come into force until April 2013. Although prospectors can still stake claims unilaterally, no longer does it follow that this gives them the unfettered right to explore. Most exploration activities now require approvals, and whether Aboriginal communities have been appropriately consulted is a factor in the approval process. Aboriginal consultation is also a factor in the vetting process required for full-scale mining.

The *Mining Act* amendments incorporate a variety of changes to the regime. These changes include a requirement that anyone applying for or renewing a license must attend a *Mining Act* awareness program which includes treaty and Aboriginal rights content, and provisions allowing the Crown to withdraw from staking "sites of Aboriginal cultural significance". However, the

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[9] See *Frontenac Ventures Inc. v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (leave to appeal to SCC denied) and *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 (leave to appeal to SCC denied).

[10] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* [2006] 272 DLR (4th) 727; 4 CNLR 152 (ON SC); *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708

[11] 2009, S.O. 2009, c. 21

centrepiece of the legislation is the introduction of the Crown as intermediary between the claim-holder and exploration activity through an approval process. The *Mining Act* now requires that prior to undertaking exploration activities prospectors either file exploration plans or obtain exploration permits depending on the nature of the proposed activity. This inserts the Crown in to the process and attempts to clarify the point at which consultation and accommodation should take place.

Under the new *Mining Act* regulations[12], holders of mining claims must submit an exploration plan before undertaking low-impact exploration activities such as cutting lines of less than 1.5 meters in width or the use of a drill weighing less than 150 kgs. According to the new regime the Exploration Plan process is as follows:

- The Proponent must notify any surface land rights owners of its intent to submit an exploration plan
- Optionally the proponent can contact MNDM to identify affected Aboriginal communities and then notify those communities of its intention to submit a plan
- The proponent must submit documentation to the Director of Mines confirming the above and, if the proponent carries out consultation, it must file a record of any consultation and comments from Aboriginal communities about the project. It must also file an explanation of how those comments have been considered (there are prescribed forms). The proponent must file with all of this, its exploration plan
- Once a proponent has submitted an exploration plan, the Director will advise any as-yet-unnotified Aboriginal communities which the Director determines may be affected by sending them the exploration plans
- Aboriginal communities may then submit feedback/comments about any adverse effects that the proposed activity might have on claimed or proven Aboriginal or treaty rights
- The Director may require that the proponent consult with any affected Aboriginal communities

[12] *Exploration Plans and Exploration Permits*, O. Reg. 308/12

- 30 days after the Director sends out the plan to an Aboriginal community (if the Director does not make any order to any other effect) the proponent may carry out the activity in the plan

For more intensive exploration work (e.g. use of drills greater than 150 kg., cutting lines greater than 1.5 meters in width) proponents must obtain an exploration permit. The process for obtaining an exploration permit is:

- The Proponent must provide a notice of intent to apply for a permit to any surface rights owners
- Optionally the proponent can contact MNDM to identify affected Aboriginal communities and then notify those communities of its intent to apply for a permit
- The proponent must submit documentation to Director of Mines confirming that it has done what is set out above and, if the proponent carries out consultation, set out any consultation and comments from Aboriginal communities about the project and how those comments and concerns have been incorporated in to the plan (there are prescribed forms). All of this should be submitted with its exploration permit application
- The Director will then distribute the permit application to any Aboriginal communities who have not yet been notified
- The Aboriginal communities will then have the opportunity to submit feedback about any adverse effects that the proposed activity might have on claimed or proven Aboriginal or treaty rights
- The Director may require that the proponent consult with any affected Aboriginal communities and also may require the proponent to submit consultation reports
- Within 50 days of the date the plan is distributed to the Aboriginal communities, the Director must make a decision as to whether or not to grant the permit and what conditions to attach to it
- The Director may put a hold on the process to allow for additional time if the Director considers it to be necessary

Whether or not this new scheme will be effective in addressing Aboriginal concerns remains to be seen, and depends on how Ontario officials interpret the amended *Mining Act* and new

regulations; and on how well the dispute resolution process added to the *Mining Act* operates when there is a dispute about the adequacy of consultation and accommodation.

Before undertaking any physical work on mining claims, a surveyor should ensure that the claims holder has submitted a plan or obtained a permit as set out above. As discussed below, because of frailties in the *Mining Act* regime's consultation process, it is also highly advisable for surveyors to recommend that consultation and accommodation of Aboriginal peoples go above and beyond the legislated requirements.

DOES COMPLIANCE WITH MINING ACT MEET THE DUTY TO CONSULT AND ACCOMMODATE?

Ontario's position is that if proponents carry out their obligations under the *Mining Act* amendments, the Crown's duty to consult will have been discharged (largely by the proponent to whom the duty has been delegated). In this regard Ontario might be correct; while the threshold for the trigger of the duty to consult is low, where on the spectrum the substantive content of the duty to consult falls depends on the specific facts of the case. Courts have been clear that the duty to consult is not a "veto" power for Aboriginal peoples over development. So, it is likely that, at least in some cases, the new regime's consultation process would withstand a legal challenge.

That said, there are various significant problems with the *Mining Act* that make it suspect. For one, it leaves the determination of whether consultation has adequately taken place to the Crown. From the perspective of many Aboriginal peoples that deny that they have ever ceded sovereignty over their traditional territories, it is not the Crown's role to make this determination. Indeed, many of the major Aboriginal organizations advocated, in consultations with the Crown respecting the *Mining Act* amendments, that the concept of Free, Prior, and Informed Consent (FPIC), embraced by the UN Declaration on the Rights of Indigenous Peoples, should be built in to the *Act*. Ontario did not act on this suggestion; the *Mining Act* process does not capture the concept of an equal government-to-government relationship between Aboriginal peoples and the Crown. By taking unilateral control over the governance of an Aboriginal people's traditional territories, the Crown could risk infringing treaty or Aboriginal rights. Companies that may have obtained a permit through the *Mining Act* regime but have not obtained the consent of Aboriginal peoples may face challenges to those permits on that basis.

A second significant problem with the *Mining Act* amendments is that the timelines of the permit and plan approval/application process are unrealistic. For example, the reality for many First Nations, particularly those located in resource-rich regions, is that they are flooded with requests and project proposals from the government and resource development companies. Many First Nations' lands and resources offices operate on shoe-string budgets and are understaffed. The result is that, despite the best efforts of the First Nation's staff, it can take more than 30 or 50 days (depending on whether a proponent is submitting a permit application or a plan) for the First Nation to adequately give consideration to a project and to assess the effects on the community's rights and interests. While the Crown can put the timeline on hold if an Aboriginal community needs more time to consult, it remains to be seen whether the Crown will use this ability in a reasonable fashion. Consultation that is carried out on a rushed timeline without providing adequate time for an Aboriginal community to substantively consider a proposal may well fail to meet the substantive requirements of consultation. This could also be a ground for challenging any permits granted as a result of such consultation.

Third, the *Mining Act* amendments do not provide for any funding for professional or other advice or studies that an Aboriginal community may need to properly respond to proposals. For example, an Aboriginal community might need archaeological or traditional land-use studies to document its concerns more precisely. Traditional knowledge does not come pre-packaged in a G.I.S. system which merely needs to be queried. Determining areas of significance to an Aboriginal community may need careful consultation with numerous different traditional knowledge holders or harvesters. Satisfying the Crown of the validity of their concerns might also need archaeological or other expert input. Aboriginal communities may also need advice in engineering, biology and ecology to be able to properly understand the impact of the proposed mining activities, in order that the consultation be fully informed.

CONCLUSION

Both the activities of surveyors themselves, and the mining exploration activities for which surveys are pre-requisites may trigger the duty to consult and accommodate. While many of the activities of surveyors themselves under the *Mining Act* are generally low-impact in nature, clearing brush, line-cutting, and other intrusive activities that physically impact the land could infringe on an Aboriginal or treaty right. Such activities may give rise to a duty to consult, as do the subsequent exploration and development activities. Surveyors undertaking work under the

Mining Act need to be aware of the consultation obligations under the *Act*, but also be aware that there may well be obligations that go beyond the requirements of the *Act*. As a result, it is advisable for exploration companies and surveyors to be respectful and to engage in communication and dialogue before undertaking any activity in the traditional territory of Aboriginal peoples.

So, how does one know which Aboriginal peoples to approach? There is unfortunately no easy answer to this question. There is no comprehensive database or list of Aboriginal rights and claims. Even more unfortunately, there are databases that claim be such which are not. Canada claims to have such an online database, called ATRIS.[13] However, it does not include any reference to claims in litigation, which is really among the first things one should check in deciding which Aboriginal peoples must be consulted.[14] Ontario also has a list of claims accessible on the MNDM website, however it is of minimal value as, like ATRIS, it does not list claims in litigation. Ontario has a more comprehensive map/database of areas in which it records Aboriginal claims, but it is not available to the public, and so it is not possible to tell if it is comprehensive or not. Ontario's MNDM claims that it will assist prospectors and developers with identifying communities that should be consulted and presumably it will use this map/database to do so. Information from Canada and Ontario might be a starting point, but only that – it cannot be relied on to rule anything out. The best one can do is start an iterative process – approach Aboriginal communities in the area and ask if there are other Aboriginal communities one should be approaching as well; learn as much as one can about the history of the area and see what that tells one.

How much consultation and accommodation is required? The law is a long way from having decided enough cases to provide definite answers – and the answer always depends on the context. The Prospectors and Developers Association of Canada has helpful (although

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[13] http://sidait-atris.aadnc-aandc.gc.ca/atris_online/home-accueil.aspx

[14] See http://www.oktlaw.com/blog/aandcs-atris-database-has-dangerous-gaps-in-data-2/ for more detail.

necessarily general) guidelines and toolkits about community engagement and preventing conflict in exploration.[15]

If one wishes to minimize the legal risks of not having sufficient consultation and accommodation, one would approach applicable Aboriginal peoples early and often in the process, and try to obtain their consent to the project. Early communication and consultation has the practical benefit of promoting good relations between the mining company and Aboriginal peoples, which is likely to result in greater chances of success for a future mining operation. When a company and an Aboriginal community have consulted and reached an understanding about the extent and nature of a given activity, it means that the permits granted by the Crown will not likely be challenged and the project can proceed. It also has the legal benefit of greatly reducing the risk that a surveyor or exploration company will unknowingly breach Aboriginal or treaty rights and incur any potential legal liability associated with that. The best way for surveyors and prospectors to reduce risk and increase the chance of success on a project is to engage in early and respectful consultations with affected Aboriginal peoples.

[15] See http://www.pdac.ca/programs/e3-plus