Mining: The brave new world -Managing Project Risk - AMPLA Conference

**The Canadian Experience by David Bursey**

*Lessons learned, best practice & emerging trends in Canada*

The Canadian and Australian experiences are similar because the digital age of communications has broadened the debate on development and environmental issues to the global stage.

Public interests & priorities

Canadian mining projects – like all natural resource projects – must understand and manage the social perception of environmental and public safety risk. The public has an increasing expectation of participation in the approvals process, which adds challenges, effort and cost to the approval process.

Most people form opinions based on factors other than the facts – i.e. there values, beliefs, trust, control over decisions, perception of risk. (See the work of Vincent Covello on public communication of risk and “outrage factors”). Social perception is shaped by new forms of communication. Anyone with a smart phone is a photo-journalist.

Understand the leading public issues – e.g. a strong interest in climate change. Participants in a project review will also be concerned about the fairness of the social and geographic distribution of benefits and risks associated with a development project. Development industry, as a whole, must respond to high profile events – such as tailing pond failures or orphan sites with legacy issues. All subsequent projects are judged against these high profile events. Another major fairness issue in Canada is the reconciliation of Crown rights with Aboriginal rights. The increasing profile of the *United Nations Declaration on the Rights of Indigenous Peoples* is a focal point of this issue in Canada.

The interest in greater public participation reflects a lack of trust in public institutions. Trust is the foundation for social acceptance. Resource developers must build their own public trust to move forward. Companies must devote considerable attention to enhancing corporate reputation, ethical practice and social responsibility.

Avoid using the term “social licence to operate”. It is an abstract concept that creates differing expectations. The focus on permission – a licence – rather than on socially responsible performance emphasizes a governance role that is vague and unachievable. In the end, it is not helpful to build trust and enhance corporate reputation.

Innovations in communication technology and social media have revolutionized how public debates on resource developments unfold. Public sentiment can be influenced and organized in ways that were unknown even a decade ago. Social engagement has changed and is continuing to evolve at a dramatic pace. Project developers and industry associations must be involved in shaping public opinion.

Government Policies Affecting Development

*Strategic Directions*

The Canadian Minerals and Metals Plan sets out several strategic directions for projects in Canada. These directions reflect government responding to social issues. They focus on economic competitiveness; advancing the participation of Indigenous peoples; protection of the environment; maintaining an innovative approach; engaging with communities; and increased global leadership for Canada.

*Environmental assessment & Project Review*

The federal and provincial governments are interested in reforming environmental assessments of project. There is a current push to build public confidence through project reviews and public participation. The interested parties' tests have been eliminated resulting in greater opportunities for public participation. There is an increasing public demand for strong conditions for projects and follow through by Government departments. There is also a public focus on the end of life processes including environmental liability after closure and reclamation. Finally, there is increased indigenous community involvement in decision-making. Canada's cumulative effects assessment involves looking at both upstream and downstream effects, including GHG emissions.

These reforms involve more process, time, cost and effort. To be successful, project developers must devote more time to front-end planning and community engagement to build support.

*Climate change policy*

Canada supports the *Paris Agreement* and has implemented a *Pan-Canadian Framework on Clean Growth and Climate Change*. The framework focuses on carbon targets, regulation and pricing. However there is a different approach across provinces, for example British Columbia has already implemented a Carbon tax, whereas Ontario and Quebec have taken a hybrid approach. The Federal Government also has a separate climate change policy.

*Aboriginal rights in Canada*

Indigenous rights in Canada are protected in the Constitution. Aboriginal rights fall along a spectrum of rights from: 1) cultural practices not connected to land (language, dress), 2) cultural practices connected to land (gathering, hunting, and fishing), and 3) the right to the land and its resources. Aboriginal title is paramount to all other titles, including the Crown's title.

Many parts of Canada are covered by treaties with defined treaty rights, and other parts are not covered by treaty so the rights are not yet defined. In all cases, the Crown must act honourably in all decisions that might affect treaty or aboriginal rights (proven or asserted). The related Crown duty to consult and accommodate is based on the principle that the “honor of the Crown” requires the Crown to consider the impact of its actions (such as the approval of resource development projects) on aboriginal rights. When an aboriginal right may be affected, the Crown must consult the Indigenous group to assess the impact and determine how the impact can be mitigated.

In practice, most of the work to discharge the Crown’s duty to consult and accommodate is transferred to the project developer. In many ways, this cost and effort becomes an informal licence fee. Most developers try to work out a project benefit-sharing agreement to obtain consent for a project.

Canada also has plans to implement the UNDRIP in Canadian law. A key concept of the declaration related project development the concept of “free, prior and informed consent”. This concept has been widely misunderstood as a veto – i.e. an absolute decision-making right – but this view is incorrect.

According to UNDRIP Articles 9 and 32, the concept of FPIC, which applies only to established rights and contemplates "consulting and cooperating in good faith with Indigenous peoples … in order to obtain their free and informed prior consent". The federal government has issued Federal Principles that clarify that the objective is to seek consent, but consent is not essential. Aboriginal rights may be infringed if there is compelling public interests that justify the infringement.

*Trade issues*

Canada is affected by a disruptive and uncertain trade relationship with the United States. The disruption creates both trade opportunities and challenges. The importance of Canada seeking other trading partners has never been greater. Canada is increasing its attention to enhancing its other trade relationships.

Recent Experience with Major Projects

The recent Canadian experience shows an often lengthy approvals process, and associated judicial challenges to approvals. Litigation associated with environmental issues and aboriginal rights issues is common.

Major Projects are affected by social causes that often extend beyond the impact of the project area, such as climate change, aboriginal rights, labour policies, procurement practices or social responsibility policies.

Regulators have been taking a cautious approach to approvals, meaning proponents need to create and maintain a good relationship with government to achieve timely approvals. It is often hard for a private company to convince stakeholders of the importance of their project. The focus moving forward should be to undertake early planning and early engagement.

Project developer must listen to external points of view to understand the issues that are likely to arise during a public project review. Early planning and community engagement is essential to success. First impressions are important, and they last a long time.