

**THE EVOLVING DUTY OF CONSULTATION:
DEVELOPING RELATIONSHIPS BETWEEN BUSINESS AND FIRST
NATIONS**

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In recent years, Aboriginal issues have come to be featured regularly in the news, often in the wake of a court decisions that become household words, like Sparrow, Delgamuukw, and Marshall, or in response to the settlement of land claims. Frequently, we hear from the media that Aboriginal rights have been “expanded” or “extended”, and that a First Nations has been “given” land and money in a land claim. This creates a false impression that Canadian courts and governments are offering something new to Aboriginal people instead of finally recognizing and reconciling the past.

Thomas Berger suggests that we are in “the second discovery of America”:

This is still the age of discovery, a discovery of the true meaning of the history of the New World and of the Native people’s rightful place in that world. This is a discovery to be made in our own time, should we choose it – the second discovery of America.

Businesses that want to do business with First Nations or on First Nation lands will be faced with a changing environment as our understanding of Aboriginal and Treaty rights changes. To succeed in this type of environment requires that businesses choose this rediscovery. In practical terms, this means becoming educated about and establishing relationships with the First Nations with which you do business.

Building relationships with the First Nations in whose territory you do business will be a reoccurring theme throughout this presentation. Without establishing a direct relationship with a First Nation, businesses are forced to make assumptions about how the First Nation views business ventures and how it will conduct business. Likely, these assumptions will either be that the First Nation is just another business like any other, or the assumptions will be based on stereotypes of First Nations and Aboriginal people.

It has been my experience that in building a relationship, the most important foundation on which to build it is developing trust. There is no set formula to achieve this, but I believe some of the ingredients include:

- Demonstrate an interest in the history and culture of the First Nation, learning how they use their lands and territories, how they govern themselves beyond the *Indian Act*, what is their capacity in terms of education and socio-economic conditions.
- Hear their current grievances and their past experiences with industry.
- Be honest and deliver messages appropriately.
- Be open and upfront about what you are doing on a step by step basis. Explain the project and the steps to achieve it and keep the community informed as you move forward to avoid surprises.
- Recognize the various constituencies within the First Nation community and their diverse interests: the Band council, the elders, hunters and trappers, youth, off-reserve populations.
- Be mindful of the politics and election cycles of the community.
- Be patient and understanding. Respect the process.

Identifying what, if any, cultural differences exist between your company and the First Nation will be an essential first step. It should go without saying that across Canada there are a range of First Nation cultures with an equally broad range of business experience and goals. The extent to which the First Nation's politics and traditional culture influences their business decisions will also vary widely not only from one end of the country to another but also within provinces, treaty areas and tribal councils.

If there are cultural differences, then it will take time and effort to learn what those cultural differences are and how they will affect the course of business with that First Nation.

Companies that do business overseas may already recognize the importance of building relationships and understanding cultural differences. But even companies that are willing to spend time and money on learning how to do business in someplace like Japan may assume that doing business with First Nations in Canada should require no such effort. Perhaps this perception is fuelled by the fact that the public generally has a poor understanding of the legal status of First Nations in Canada.

This raises the second key to doing business with First Nations, which is becoming educated about the First Nations that you work with.

It would be impossible to summarize the status of aboriginal people and First Nations in Canada in such a brief presentation, but there are a few general lessons that can serve as a starting point to understanding a particular First Nation's legal rights and status.

At the time Europeans began settling in North America, the Aboriginal people living here were organized in distinct cultural entities with their own social and legal structure, using and occupying their exclusive territories.

The Aboriginal concept of "ownership" was vastly different from that which existed in European communities. It centred on community use and enjoyment of the lands as a source of food and support for their existence. Humans had the privilege of using the land during the period of one's lifetime, but future generations had rights in the land as well, and there was a duty and obligation to pass on the lands to future generations.

Contrast this with the European concept of ownership. In the European mind, individual ownership was very important. Parcels of land represented bundles of rights, which could be divided among more than one person. For example, the mineral estate could be divided from the surface estate and at the same time, a mortgage and a lease could be granted for the same parcel. Because of these concepts of rights, it was necessary to define specific boundaries and to develop a complex system of rights and a legal system to deal with them.

When Europeans arrived and established colonies, there were three principles that governed how different colonizers dealt with each other and with the indigenous inhabitants.

International law had by then developed the principle that if a country was conquered by war, and surrendered, the conquering country could exercise rights of ownership to the lands, and the inhabitants would be governed by the conqueror's law.

There was also the principle of "discovery" of new lands. A new land was "discovered" if there were no inhabitants. In such cases, the discovering state would henceforth exercise rights of ownership. Determining whether a land was discovered necessitated deciding whether it was inhabited by "people", and this judgment was made on the basis of the standards of the day by each country. "People" as we understand the term today was not always consistently applied – and in some parts of the world, aboriginal groups were not acknowledged as being "people".

A third principle emerged when the old world came into a territory that was inhabited and it exerted control over that territory, but it did not do so as a result of a conquest in a military sense. In that case, the Europeans and inhabitants co-existed, and any relinquishing of land rights was done by agreements of purchase or surrender of lands referred to as "treaties" or be specific

legislative action to remove the inhabitants' rights. This was the principle that the British applied to what is now Canada.

From very early times and consistent with these principles of law, the British adopted the practice of entering into treaties with Indians rather than conquering them. Treaty making in North America began in the British Colonies in what is now the United States and was later introduced into Canada.

One of the foundational documents in Canada's relationship with the Aboriginal people is the Royal Proclamation of 1763. This Proclamation provided two important points:

1. that all lands not purchased by the British Government from the Indians belonged to the Indians; and
2. that further lands could be acquired from the Indians only by the government.

This Proclamation is part of Canadian law today, and is cited as one of the cornerstones of native rights in Canada. If there is one lesson to be understood from this history, it is that the recognition of Aboriginal ownership and autonomy is a historical fact that has been a part of our law for centuries. It is this history that sets Aboriginal people apart from the rest of Canadian society.

The nature of the rights and interests of the First Nations also varies across Canada. There are areas that have "Peace and Friendship Treaties", "Numbered Treaties", "Moderns Treaties" and no treaties. You therefore need to know the nature of the potential rights.

From these historical foundations, the legal status of Canada's First Nations varies widely depending on such things as whether on not they signed a treaty and what treaty they signed.

Because of this variability, it is unwise to simply assume that a company can adopt a “one size fits all” approach to dealing with First Nations in Canada.

However, making the effort to understand the legal status and some of the history of the First Nation you are dealing with is an important part of establishing a good relationship with that First Nation.

Likewise, it is important for businesses to recognize that the legal landscape of aboriginal rights is constantly changing. Although First Nations’ perceptions or positions with respect to their rights may sometimes be at odds with the current government or legal views on the matter, it is not unheard of, and maybe not even unusual, that First Nations are simply ahead of the courts. A good example of this is the recent BC Court of Appeal decision involving the Haida First Nation. I have made available a summary of this case which has been distributed. It is currently under appeal to the Supreme Court of Canada, but already it has received considerable attention. In that case, the BC Court of Appeal found that a company, Weyerhaeuser, had a duty to consult the Haida First Nation with respect to the renewal of a tree farm licence. Prior to this decision, the duty to consult was widely considered to be strictly a governmental obligation. It was felt that as long as a company validly obtained its rights to extract or harvest natural resources from the province or federal government, any failure to properly consult the affected First Nations would be the government’s problem and not the company’s. The Haida decision has changed that view and has changed the advice that lawyers now provide their clients.

All this goes to illustrate the importance of keeping abreast of the changes in the legal and political landscape when dealing with First Nation issues.

Recognizing that I have warned against the hazards of relying on generalizations in dealing with any one First Nation, I would like to conclude with some general observations made by those who work a great deal with business and First Nations.

First, when doing business or consulting with First Nations, the protection of the environment, cultural sites and natural resources will often be seen as requiring something more than simply meeting the statutory requirements.

Second, First Nations will frequently view consultation as something more than a process that is required to be completed before the First Nation is once again forgotten. Consultation with First Nations can often reveal a desire by the First Nation to participate or partner in the development or project.

This ties in with the third general observation which is that it may not be enough to offer to train members of the First Nation or to allow a First Nation company to compete for contracts. Depending on the First Nation and the project or development, the First Nation may be looking for assistance in establishing a business that will benefit from the project, or they may feel entitled to some participation in the venture.

In response to each of these three general observations, some might question why it is that a First Nation should have such influence or sense of entitlement. People often see this as special treatment or – as has lately become popular among some of the media – a race-based privilege. This takes us back to the importance of becoming educated about First Nations and their legal status.

As the brief history lesson and the *Haida* case should make clear, the status of First Nations is based on their historical occupation of this land and the fact that British and Canadian law has recognized certain continuing rights arising from that history.

Accepting that doing business with First Nations and in First Nations territory will require a constantly evolving appreciation for the social and political environment of Aboriginal people is really just to recognize a Canadian reality. John Ralston Saul has described Canada as a “permanently incomplete experiment built on a triangular foundation – aboriginal, francophone and anglophone.” Governor General Adrienne Clarkson elaborated upon this thought in her installation speech before the Senate in October 1999:

What we continue to create, today, began 450 years ago as a political project, when the French first met with the aboriginal people. It is an old experiment, complex and, in worldly terms, largely successful. Stumbling through darkness and racing through light, we have persisted in the creation of a Canadian civilization.