

ABORIGINAL AWARENESS

TITLE:

## Wanted Now: Relationships that Work

**Too many government policies fail to recognize the court-upheld land rights of Canadian Aboriginals, says our Aboriginal Awareness columnist. What's needed now are acceptance of the current legal landscape and a willingness to work together.**

*Editor's Note: The following is the sixth in our series of Aboriginal awareness columns, which stem from an APEGGA Business Plan goal to increase Aboriginal awareness in the engineering, geological and geophysical professions. Check The PEGG Online for earlier stories in the series.*

BY ROBERT LABOUCANE

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A new working relationship is long overdue – and desperately needed – between Aboriginal Canadians, government and industry. Yet my experience with all these groups underlines that a huge amount of confusion remains about just what needs to be done to achieve this goal.

Who will the partners be and how can lasting, respectful interaction be achieved and maintained? These are crucial questions for our country, our citizenry and our shared future. These are crucial questions for you.

Endless national conferences, frequent debates and ongoing controversy centre on this issue. We should, however, be well past arguing and clinging to non-productive, even irrelevant positions.

That's right, folks. It is time to move forward.

### **Precedent Set**

The backdrop for all this is built on numerous Supreme Court rulings and interpretations of existing law.

Beginning with the Calder decision in 1973, the sphere of interaction with Aboriginal people, their leadership and communities has changed dramatically, and the legal community, industry and governments have been trying to figure this out. This Supreme Court of Canada ruling confirmed the existence of Aboriginal title as a concept in Canadian common law.

Many people in the legal community and industry find it hard to believe our courts have moved in a direction that acknowledges certain inherent rights of Aboriginal people. The nation's highest court has even told Canada's government that there will be reconciliation for past injustices.

In December 2007, Aboriginals across Canada celebrated the 10th anniversary of the Delgamuukw/Gisday'wa decision, which recognized Aboriginal rights under the law and the Crown's legal obligations. This victory has been critical in advancing rights of Aboriginal people on their lands and in their communities, and confirmed in many subsequent court rulings. Every day, these rights are defined, recognized and affirmed and then the extinguishment and setting aside of these rights are put on the table as an opening position of Canada's government at dozens of negotiating tables.

### **Governmental Blinders**

But what exactly is the problem?

The way the federal government interprets and implements laws is consistently at odds with what the courts keep saying – about the same laws.

Canada's government continues to demand that Aboriginal people surrender constitutionally guaranteed rights – extinguish them, actually – as part of the “new treaties” being negotiated. Then the government wants access to lands and resources that were never surrendered in the first place.

This is happening even though the Delgamuukw/Gisday'wa decision ultimately rejected the Crown's long-standing position on many fronts.

The government mindset is no longer acceptable or justifiable as an opening position.

It has taken Ottawa 10 years to actually reach a point where a plan to move forward is even being discussed within and among government departments that deal with First Nations people.

Since the Delgamuukw/Gisday'wa ruling in 1997, there have been many equally significant decisions, and they also continue to confuse and confound our federal government. Their response has been rather pitiful if not outright confrontational, when it comes to honouring its obligations.

Aboriginal Canadians no longer have to stand by and watch their traditional territories sold, infringed upon and misused. They have the inherent right to the land and the right to decide what is done on the land and what is done to them as people.

This essentially means that Aboriginal governments and communities must be meaningfully engaged at the highest strategic levels of planning. Letters advising them of an infringement are no longer acceptable; they must have a seat at the negotiating table or the court can nullify any transactions that have occurred on the land in question.

This isn't just me talking. This is our courts talking. And this is the reality that you, as Canadians, as industry representatives and as APEGGA members, need to accept and deal with.

Not surprisingly, provincial and federal regulators have felt the impact. My reading suggests, however, that Alberta still has a long way to go when it comes to fully engaging Aboriginals in the regulatory process.

I hope governments and regulators bring forward full explanations for all stakeholders' benefit, because the high court's direction is clear – infringement without full and informed consent must be justified before a judge.

As far as I know, such infringement being allowed by the courts has never happened. I do know that court-supervised consultation between two parties is currently happening as a solution in some specific situations.

We'd better start paying closer attention to this mess. We need to find ways to cooperate, and we need to do it accordance with the clear directions of the courts.

### **Respecting One Another**

What does this mean to industry members who have assets on land they wish to develop? What is their legal obligation?

Your legal advisers can best answer those questions, but I can tell you this: the better the relationship between industry and their new Aboriginal partners, the fewer problems there will be in accessing and developing assets.

Stakeholders need to improve the quality of their relationships and bring out the best in each partner to the benefit of the whole initiative.

Governments and industry have to figure out how they are going to build respect and trust to ensure collaboration and cooperation with a group of people they often just don't understand or know much about.

I believe it can be done.

Am I dreaming? No way. Look what's happening in B.C., where real progress has begun.

In July 2007, the premier's office there issued a news release hailing a "major milestone." It was the issuing of mine permits to allow NovaGold and Teck Cominco to develop the province's first new metal mine in over a decade.

"A large part of the success of this project was the way in which the corporate partners worked with and received the support of the Tahltan (Aboriginal) leadership," said the release. "From the outset, their relationship has been based on respect to foster a cooperative and mutually beneficial relationship."

Said Premier Gordon Campbell: "The success of this project is a perfect example of how industry and First Nations and government can work together

to develop our mineral resources in a responsible, sustainable manner that will bring benefits to the entire region.”

B.C. Government figures show investment in mineral exploration soared to a record \$265 million in 2006, an increase of more than 600 per cent since 2001, as Aboriginal issues have begun to gradually be sorted out. About 600 exploration projects were under way last year. Mining in the province has grown to an \$8-billion industry.

Certainty of tenure on the land and a change of attitude within the provincial government, as well as industry, are providing the comfort required for investments.

It sounds to me that the process defined by the courts for reconciliation with Aboriginal people, and their participation and inclusion in these projects, is in fact desirable and doable.

“The give-me-what-I-want approach is history in B.C. now, with the joint federal-provincial review panel handing Aboriginal communities a veto over resource development in everything but name,” wrote journalist Patrick Brethour in the *Globe and Mail* Report on Business last Sept. 21

### **Large Territory Recognized**

The full measure of Aboriginal title appears to be a legal reality in B.C.

In fact in October 2007 B.C. Supreme Court Justice David Vickers awarded the Xeni Gwet’ in people of the Chilcotin region 200,000 hectares of the 400,000 hectares they claimed west of Williams Lake.

“Why would any First Nation be foolish enough to ratify any (treaty) settlement for less than five per cent of their territory when the Xeni Gwet’ in achieved recognition of their title to 50 per cent of their territory,” said Grand Chief Stewart Phillip, president of the Union of B.C. Indian Chiefs.

Tribal Chief David Luggi of the Carrier Sekani Tribal Council in B.C. said it’s the government’s responsibility to negotiate fairly – or pay the price. “The Supreme Court has given real power to the Aboriginal people and the Carrier Sekani will exercise that power as they see fit, whatever the cost to industry. If the government doesn’t come to the table and deal with the Aboriginal people honourably, more of these projects are going to fade away.”

The president of a mining industry group said it’s important that the province explain the impact of the ruling on key stakeholders. “The Mining Association of B.C. is urging the province to clarify the obligations towards Aboriginal bands for potential investors,” said president Michael McPhie.

“That clarity, of course, is the overarching goal of the treaty process in B.C., where most of the bands have yet to sign any formal surrender of their rights to their traditional lands.”

### **Goodbye Treaty Process**

From an Aboriginal leadership perspective in B.C., the treaty process is dead. Justice Vickers also ruled that the province had no power over Xeni Gwet'in lands, which means this First Nation has greater control over logging, mining and exploration.

This is the first time a court has determined a specific band has title to a specific piece of land.

Similar activities are taking hold across Canada as governments and industry finally come to grips with this reality.

But how do we ask someone to marry us when we don't know anything about them?

For many in industry, the process has been going on for more than 30 years. Dozens of best practices have been tested and proven to work for all parties involved.

Some companies are doing better than others. Hundreds are making, I believe, an honest effort. Others, unfortunately, simply refuse to accept this new reality.

Let's emphasize the positive. Numerous companies are well past courtship and fully engaged, and are paying much attention to the maintenance of their partnerships.

These arrangements go all the way from a simple agreement in principle to a full joint-venture partnership, with the usual memorandums of understanding, impact benefit agreements and participation agreements along the way. Throw in limited partnerships and you begin to see the picture – a full pastiche of negotiation, process and progress.

### **Industry Becomes Aware**

The tipping point for my company was Nov. 18, 2004, with a landmark Supreme Court decision triggered a demand for our Aboriginal awareness training services far beyond anything we had experienced in the past 20 years. Today, my staff and I work full throttle delivering those services.

Since Aboriginal rights, treaty rights and the existence of Aboriginal title are confirmed and recognized, and since the courts will not accept or allow infringement of these rights without full disclosure and justification, I can draw only one conclusion: We need to get to know each other and get down to the business of building a better country – for everyone's benefit.

Delays, confrontational attitudes and hindrances are simply not acceptable or in the best interests of Canadians. The status quo of confrontation must stop.

Will you join me in this effort, regardless of how limited or how extensive your dealings are with Aboriginals and First Nations? I hope so.

Your questions and comments are most welcome. E-mail me at [robert@ripplefx.ca](mailto:robert@ripplefx.ca).

