

ABORIGINAL AWARENESS

Secrets of Their Success

Have you ever wondered how industries and Aboriginal communities ever get down to business? Mutual success, our Aboriginal awareness columnist writes, is a long and careful process grounded on strong, respectful and genuine relationships

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Editor's Note: The following is the ninth installment in our series of columns designed to improve awareness of Aboriginal issues. They stem from an APEGGA goal to increase Aboriginal representation in the engineering, geological and geophysical professions. Check The PEGG Online for earlier stories in the series.

The more a company can articulate a desire to build ties with the Aboriginal people — and the less it demonstrates a need to build ties — the better. This may sound contradictory, and for sure it is a subtle point.

However, it is perhaps the most crucial one I can offer as guidance in conducting activities on the traditional territories of Aboriginal peoples.

This is advice you can't afford to ignore. Working with Aboriginal people and their communities has become a critical component of corporate operational planning. Training in Aboriginal awareness and consultation is only the beginning of establishing long-term, committed relationships.

You might want to stop wishing things were different and just get on with it.

Governments Act at LastLandmark court decisions from the Supreme Court of Canada over the past 35 years have had a significant influence on the definition of infringement of rights, the federal and provincial governments' duty to consult, the existence of original Aboriginal title, treaty rights, Aboriginal rights, inclusion and participation of Aboriginal rights holders, and the necessity for project proponents to receive full and informed consent from Aboriginal rights holders. The Supreme Court of Canada has made it perfectly clear that its intention is to direct the federal and provincial governments toward full and complete reconciliation with the Aboriginal peoples of Canada. Consultation — initiating a conversation — is the road to reconciliation. Most government responses have been slow in coming (25 years for the federal government).

However, today we see provincial and federal governments aggressively developing individual Aboriginal consultation guidelines for the intended use of

their employees and to fulfill their duties.

In Alberta the guidelines developed have been unanimously rejected by the Alberta chiefs. Other provinces have learned from the Alberta experience and created their guidelines with much improved, and more acceptable and doable policies and processes.

Saskatchewan has begun a provincewide roundtable to build homegrown consultation guidelines. It's incorporating significant input from Aboriginal communities across the province.

Industry's Progress

Through various of its groups, industry has been developing its own unique methods and processes of consultation for more than 35 years. Whether you're in construction, oilsands development, forestry, pipelines or mining, your industry has its own consultation guidelines for its own regions and circumstances.

Many of these plans have been developed by mere cherry-picking of those guidelines that fit best from all the choices available. Often, provincial guidelines simply won't work for industry — they don't mesh properly.

Identifying and developing your organization's business case becomes a priority as soon as land is leased or a claim is filed. From this comes the development of your Aboriginal relations program.

This will ensure employees and management are all rowing in the same direction and for all the same reasons. Certainty and confidence bring comfort and positive participation.

Investors, customers and employees will come to understand how important these genuine, sincere and committed partnerships are to the long-term well being of the project. Your Aboriginal partners must be intensely involved, equally committed and fully engaged to ensure fulfillment of the mutual-benefit philosophy and common goals.

There is a "getting to know you" time. It provides the project proponent the opportunity to ask: "Would you (Aboriginal leaders) help us develop a consultation plan we can both agree to so we can begin our formal consultation process?"

Both parties are responsible for identifying strategies, objectives, actions and resources to achieve the desired outcome. Managing expectations (hope), clarifying issues and common concerns, and discussing employment and

contracting opportunities, as well as ways to mitigate environmental impacts — all require compromise and collaboration.

Hope Through Industrialization

Keep in mind that expectation is just another word for hope. And managing hope can be a significant challenge.

With the continual diminishing of the Aboriginal people's traditional lifestyle, something must replace it. It seems the industrialization of traditional lands brings hope to many people in these communities, especially the youth. But with this hope comes fear, as well. Managing both is a daunting task.

These efforts teach everyone about how to be good business partners — and good neighbours. Understanding the need to operate effectively and efficiently in a constantly changing regulatory environment becomes a common goal. It requires strong support from each partner.

What goes on between an Aboriginal community and its industry partner will be determined more by the quality of their relationship than by any other factor.

The better informed the proponent's representatives are, the less they'll have to apologize for later. The more skilled they are at demonstrating respect, the greater respect they receive in return. The sooner trusting relationships are established, the sooner the project moves forward. The more involved the new partners are, the less likelihood there is of future disruptions.

The challenge is to improve the quality of these relationships in order to bring out the best in each partner to the benefit of the whole initiative.

Once your agreement is in place and has community support, everything depends on its maintenance. This includes providing the Aboriginal community progress reports and insisting on their inclusion in finding solutions on how best to hit agreed-to targets.

Let the Agreements Begin

A memorandum of understanding is a non-legal agreement between parties that have reached consensus through their consultations and negotiations. Known as an MOU, you could call it an agreement to continue agreeing. The MOU is based on an established level of trust and it leads to essential partnerships between Aboriginal communities and their corporate partners.

Social, environmental, education and economic development are on a horizontal,

not a vertical, list. All items are prioritized number one.

These initial arrangements are generally for two-year terms with two-year automatic renewal clauses, unless either party wishes to terminate.

A typical statement in an MOU could be: “Fuel The World Ltd. recognizes the constitutionally protected Aboriginal and/or treaty rights our Aboriginal partners have. We encourage all our employees to engage with our Aboriginal partners, respect these rights and minimize the potential for adverse impacts that our project may have on the land.”

An MOU triggers the development of an action plan. The action plan identifies accountabilities and reporting processes, determines anticipated timelines, identifies resources required, and clarifies mutual benefits and objectives. The partners are now promoting and facilitating increased engagement, partnership investment, education and employment opportunities, community development, environmental sustainability and related monitoring of the effects of the project.

Working relationships come in many forms. Impact benefit agreements, also known as accommodation agreements, are legal contracts between the project proponent and Aboriginal rights holders the project will impact upon.

Negotiations for an IBA are not consultations at this stage. The Crown is excluded from the table, funding to negotiate is determined, and confidentiality is assured and without prejudice, all of which would have already been determined during the consultation phase.

Company contracts provide benefits to their Aboriginal partners in return for the partner’s cooperation, on-going support, and access to land and identified resources. Consultation and negotiation budgets include expenses such as travel, consultants, legal services, Aboriginal staff time, honorariums for elders and community meeting expenses. Discussions about royalties, profit sharing and equity participation are inevitable.

Aboriginal participation in the gathering and sharing of traditional knowledge, archeological activities, and wildlife, plant and fisheries studies must be encouraged and supported.

A Few Landmines To Avoid

A note of caution. Since the Aboriginal community and the federal government almost literally hate each other, try to avoid being in the same room with these two groups if you expect to get any relationship-building done or any business discussion accomplished. The only environment these two groups experience

with each other is a constant state of anger and confrontation.

For example, the Crown refers to “Aboriginal rights” or “treaty rights” only as “Aboriginal interests.” All that does is get the Aboriginal people even more angry by confirming complete disrespect.

Here’s a challenge. How does your company structure your impact benefit agreement to shield your partner from potential interference from the Department of Indian and Northern Affairs? Any capital received by your partner can’t be viewed as “Indian monies.”

Another note of caution.

Even after all the negotiations are complete, with both parties in complete agreement, and with express written consent reached, based on community ratification and a duly authorized resolution of the council — the Minister of Indian and Northern Affairs could quash the deal or at the very least delay, delay, delay. It’s in the Indian Act.

Is it possible to maintain claims against the Crown yet not impact the project’s continued operations? It is critical that an accounting firm and a legal firm familiar with these very complex issues be engaged. Do not ever risk being put into the same boat as the federal government.

Broken promises equals broken projects. That’s the bottom line.

There are literally dozens of issues the Crown is required by law to consult on with the Aboriginal community as part of the impact benefit agreement. Your people just don’t want to be there.

These two groups will try to get some kind of interim agreement in place, for example, if tight regulatory process timeframes are a problem. Hopefully, industry allows for more time than initially thought.

Other important considerations would include subjects such as the Aboriginal community’s capacity to consult on and negotiate traditional land-use studies, the mapping of traditional lands and associated claims, human resource inventories, and the identification of economic development opportunities, including business start-ups and associated contracting.

It should be clear that any community’s vote of ratification on an impact benefit agreement does not mean that an Aboriginal partner agrees to the wholesale infringement of their rights. As well, your partner will want to know what other Aboriginal communities have obtained in similar IBAs.

And More Considerations

Yes, there's more. What has been done before to ensure a successful implementation of the IBA? What are the income tax regulations and do the parties require an advanced ruling?

Today there are hundreds of IBAs in Canada, with dozens more in various stages of consultation. This goes on every day in every industry. It seems they are all quite different, with many unique and tailored provisions.

Industry has pretty much concluded that the why and what of this process have been resolved. Moving on now to figure out the who and the how has become a hurricane of activity, especially for those trying to catch up. It is being done, however, and there are many proven best practices. Business is being taken care of.

Getting a regulator to approve the project by issuing a permit to proceed is a major milestone. Getting a social licence from those impacted by the project is equally important, as this is your social contract. There are stakeholders and there are rights holders, and you really must know who they are — and what the differences are between stakes and rights.

Getting to know each other is part of the courtship, and as the relationship evolves and grows, so does respect and trust. Consultation and negotiation of these various agreements and business arrangements constitute a massive undertaking. It requires much work and possibly years of time, thus an early start would be very wise. It requires specialized skills, sincerity, genuine long-term commitments, and a full and complete understanding of your new partners.

Some Parting Words

Maintaining respect and trust over the term of the project is perhaps the greatest challenge of all.

“The people who are sent to consult and negotiate with Aboriginal people have no idea of Aboriginal attitudes, rights or customs,” noted Ontario Supreme Court Judge Robert Reid.

Or, as Albert Einstein declared: “Setting an example is not the main means of influencing another, it is the only means.”

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