

## **Aboriginal issues: Achieving Greater Certainty**

Businesses operate best in a stable and predictable environment, where rights are certain and are protected by the rule of law. The biggest issue for the business community arising from Aboriginal claims is uncertainty. In British Columbia, for example, Aboriginal groups assert rights of ownership or control over all of the land in the province, but those rights are not recognized in the legal regime that business operates in.

Many activities that businesses pursue, or would wish to pursue with the permission of the Crown, may be seen as impacting these asserted Aboriginal rights in some way. It is clear that Aboriginal rights and Aboriginal title still are protected by the Constitution, but in most instances the extent of Aboriginal rights is unclear, while the extent of Aboriginal title still remains completely unknown.

### **Increased Expectations**

The gap between what Aboriginal and non-Aboriginal populations would accept as a reasonable resolution or reconciliation appears to have grown in the last decade.

It appears to many of the Canadian Chamber's members that since the 1997 decision of the Supreme Court of Canada in *Delgamuuk'w*, to the effect that Aboriginal title has not been extinguished, there has been a trend of increasing expectations by Aboriginal peoples as to the extent and strength of their rights.

Two recent and significant events that may have contributed to raising those expectations are the (non-binding) statements made by Mr Justice Vickers in the *William* case in November 2007 concerning the extent of Aboriginal title of the Tsihlot' in people, and the 2009 Recognition and Reconciliation (R&R) initiative of British Columbia. Although the R&R initiative was ultimately declared "dead, dead, dead" by British Columbia's Aboriginal leadership, before it died it proposed a very significant degree of control of provincial resources through "shared decision making", as well as the potential recognition by the Province of British Columbia that Aboriginal title existed throughout the whole of the province.

The level of Aboriginal expectation is probably best indicated by the extent to which a standard of "free, prior and informed consent" was adopted by Aboriginal groups as a precondition to business development. This principle was expressly rejected by the Supreme Court of Canada in *Haida* in 2004, expressly rejected by the federal government when it voted against the UN Declaration on the Rights of Indigenous Peoples in 2007, and expressly rejected on November 12, 2010 when Canada issued a Statement of Support endorsing the Declaration as an aspirational document but at the same time noting it was a non-legally binding document that does not alter the legal duty to consult.

The increased level of expectation of Aboriginal peoples may be a significant factor in the lack of progress in the Treaty process, and the withdrawal of many Aboriginal groups from the Treaty process altogether, since what is offered in that process cannot meet their present levels of expectation.

Further directions and clarity on the legal rights of Aboriginal people appear to be necessary to move forward with the ultimate goal of reconciliation. Under our Constitution, the Supreme Court of Canada is the only body that can define the rights of Aboriginal peoples.

The Canadian Chamber of Commerce is not generally of the view that recourse to the courts is the best way to resolve a dispute. However, the most prudent way of determining whether the expectations of aboriginal peoples are supportable is to have more cases concerning the extent of Aboriginal rights and title determined by the Supreme Court of Canada.

### **Achieving Long Term Certainty Will Require Negotiation, Litigation and Time**

Certainty concerning the extent of Aboriginal rights and title will most likely be achieved by two methods running in parallel – that is, by a combination of court decisions which will provide better guidance to all parties as to the actual extent of aboriginal rights and title, and by negotiations culminating in final settlements in the Treaty process.

It is important to note that achieving certainty concerning the extent of Aboriginal rights and title in Canada will take a very long time, and it is necessary to create a workable environment for the business community pending final achievement of that goal.

### **Achieving Greater Certainty in the Short-Term**

The challenge for federal and provincial/territorial governments is to create an environment which will allow businesses to operate successfully and competitively – and with greater certainty – for the foreseeable future, while the resolution of the Aboriginal rights and title issues is still underway. The solution, as noted below, is to institute an effective process of consultation, as suggested by the Supreme Court of Canada in *Haida*.

The most important recent decision that provides how to achieve greater certainty in the short term with respect to Aboriginal rights issues is still the November 2004 decision of the Supreme Court of Canada in *Haida*.

The *Haida* decision – and the companion *Taku* decision – addressed the process the Crown should follow before granting licences and rights which might affect unproven but asserted claims to Aboriginal rights and title. This was further clarified by the decision in *Rio Tinto Alcan* (2010).

The key finding of the Supreme Court of Canada was that the Crown has a duty to consult with aboriginal groups who have not yet established their rights, before granting licences or permits that might affect their asserted rights, and in some circumstances, the Crown has a duty to ‘accommodate’ those aboriginal groups.

The Court made it clear that the duty to consult with aboriginal groups is one owed solely by the Crown, and is not owed by the business community.

The Court described the nature of the consultation required as being on a sliding scale, based on an assessment of the strength of Aboriginal claim and the impact of the proposed activity on the asserted Aboriginal interest.

The Court also commented on ‘accommodation’, describing it as a process of trying to harmonize the competing interests of development and the wish to protect aboriginal interests.

A very interesting part of the decision was a statement by the Court that the Crown (both federal and provincial/territorial) could establish regulatory schemes to comply with the legal obligation of consultation. In effect, the highest Court in Canada advised the Crown that if a fair process for consultation was established, and followed, then the courts would uphold the decisions that emerged from that process.

The consultation principles in *Haida* were also applied to Treaty rights in *Mikesew* (2005), and were further clarified in the Treaty context in *Little Salmon* (2010).

From the perspective of the business community the consultation process largely remains a black box with almost no rules. This is a major impediment for business people. Achieving greater certainty with respect to the process of aboriginal consultation – with guidelines, timelines, and outcomes that can be relied on – is of critical importance to the business community.

Indian and Northern Affairs Canada (now Aboriginal Affairs) made an initial effort to address this policy vacuum by releasing its “Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult” in February 2008 and has followed up with the Federal Consultation Guidelines of March 2011.

However, these efforts fall short of the regulatory regime that was suggested to both levels of government by the Supreme Court of Canada in 2004 in *Haida*. According to Wikileaks, a cable from the U.S. Embassy in Ottawa “...as long as Canada lacks a clear definition of Aboriginal rights or a uniform model for negotiations, effective mechanisms to resolve Aboriginal grievances in a timely manner will

remain elusive". There is little guidance from either Crown as to what are the reasonable outcomes or timing expectations in a consultation process.

One additional point is that the federal/provincial/territorial governments are often involved in the same project, with permits required from each of them. There is no real effort to coordinate the consultation processes required for the different permits, so the consultation process is generally repeated by both levels of government, with little or no reference to the other, adding to both expense and delay.

### **Revenue Sharing by the Crown(s)**

A common companion to the wish of Aboriginal groups to have greater control over the decision making process concerning whether a new business activity should proceed, is a wish to receive a portion of the revenue derived from the proposed business activity.

Whether an Aboriginal group should receive such an economic benefit is a matter of policy that should be determined by the Crown, and not by individual businesses.

In *Haida* - and the decisions that followed - the Court did not propose a practice of paying money as a requirement of 'accommodation' before Aboriginal rights had been established. Outside of business activities carried out on reserve or Treaty land, there is no legal basis to suggest that the business community should be paying Aboriginal groups for the "right" to conduct business.

How the resource revenues and tax base of a province/territory should be shared between the Crown and the Aboriginal people ought to be a matter of government policy, and not developed as a consequence of individual arrangements between Aboriginal groups and business people based on self-interest and pragmatism, as a consequence of the failure of the federal and provincial/territorial governments to develop an effective consultation process, or a workable policy around revenue sharing.

In summary, while both levels of government have been taking steps in the right direction to assist in achieving greater certainty for business in the province, there is still much room for improvement.

### **Recommendation**

That the federal governments work with the provinces and territories to:

1. Develop harmonized workable regulatory processes for carrying out consultation with the aboriginal people that will amount to the regulatory schemes referred to in *Haida*.
2. Continue to provide clearer guidelines for the business community with respect to its role (if any) in the consultation process.
3. Continue to develop policies around revenue sharing with Aboriginal peoples.
4. Make it clear that it is not an expectation or requirement of either Crown that in the course of permit approval businesses must pay Aboriginal groups in order to carry on business on land over which Aboriginal peoples do not have an established legal right.