FIRST PEOPLES Feature

Allan Donovan

Duty to Consult and Accommodate:

Doing Business in Aboriginal Territory

When a business seeks to acquire an interest in land or a resource tenure, it does its homework.

It determines whether the vendor has title to the land or tenure that is to be acquired. It determines whether the interest being sold is subject to encumbrances and what the terms of these encumbrances are. Where appropriate, it will conduct an environmental review to determine whether it is purchasing degraded land. Considerations of local government and who the neighbours are may come into play.

But what of the claims made by Aboriginal Nations? Until relatively recently, Aboriginal interests were seen as a moral or political question—either the product of ancient wrongs that could legitimately be ignored or a matter for the government to resolve through negotiations.

Legal decisions emerging over the course of the last 15 years have established, however, that the traditional approach of benign neglect to Aboriginal interests in land is unsound and risky. Businesses that fail to keep up with these important developments in case law do so at their own peril.

To understand the issue facing third parties doing business on Crown lands in British Columbia, it is necessary to step back into the early history of the province. British Columbia was then, as it often is today, the odd-man-out in Confederation.

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While a Treaty-making process was commenced during the Colonial period, the process was shut down for lack of resources before it could cover much of British Columbia's land mass. Post-Confederation Victoria simply denied there was any reason to negotiate with the Aboriginal Nations whose land formed part of the new province. Aboriginal title was rejected as a baseless concept, likely instilled in the native mind by "white agitators."

British Columbia and Canada unilaterally set apart tiny segments of the province as "Indian Reserves." With the exception of the northeast corner of the province where Aboriginal Nations entered into Treaty 8, no attempt was made by British Columbia to address Aboriginal land interests off-reserve. The attitude seemed to be: why negotiate when denial is working just fine?

The first strong hint that British Columbia's legal approach may have been legally unsound was the decision of the Supreme Court of Canada in *Calder* in 1971. Here three judges held that the Nisga'a held Aboriginal title to their traditional lands; three judges held that while the Nisga'a had once had title, it had since been extinguished; the final judge did not deal with the question of Aboriginal title on the merits, leaving the matter essentially tied.

This was the state of the law in 1982 when Section 35 of the new *Constitution Act* recognized and affirmed existing Aboriginal and Treaty rights. The content of these constitutionally protected rights was elaborated by the Courts over the two decades to follow on a case-by-case basis. The Courts have found, for example, that Section 35 can protect the right to fish for food and social and ceremonial purposes (*Sparrow*), the right to hunt (*Alphonse*), and the right to construct a hunting cabin on Crown land (*Sundown*).

Ultimately, in *Delgamuukw* the Supreme Court of Canada held that the constitutional protection promised in Section 35 could extend to include Aboriginal title—the right of the Aboriginal Nation to use Aboriginal title lands in accordance with its own discretion. This right, the unanimous Court concluded,

encompassed the right of the First Nation to use Aboriginal title lands for modern economic purposes so long as these uses did not conflict with the basis upon which Aboriginal title was originally established. Thus, the province's historic denial of the concept of Aboriginal title was wrong at law.

The province moved swiftly to a different level of denial. While Aboriginal title could exist "in theory," the province noted, no First Nation had yet established Aboriginal title to a square inch of the province. According to this argument, the province does not yet owe any duty to Aboriginal Nations with respect to the Aboriginal rights set out in the *Constitution Act* because these rights had not yet been established in Court. British Columbia, under this argument, only owed enforceable legal duties to the few Aboriginal Nations who had proved a particular right in Court and the few British Columbia Aboriginal Nations who had entered into treaties. As will be discussed below, the effectiveness of this new approach has been limited.

So what are the implications for industries doing business on Crown lands in British Columbia? In 1997 British Columbia forestry giant Canfor discovered these implications can be significant. Canfor had been granted a cutting permit adjacent to the reserve of the Halfway River First Nation. The Crown had failed to consult adequately with the Halfway people concerning the ways in which their Treaty rights to this land could be accommodated. Accordingly, Canfor's cutting permit was set aside. Justice Finch, at the Court of Appeal, emphasized that the Crown, when dealing with constitutionally protected treaty rights, owed a duty to consult and that this duty:

> …imposes upon it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plans of action…

Thus the Crown's failure to live up to its constitutional obligations to Aboriginal Nations could affect the economic interests of third parties.

While the Court of Appeal had established the constitutional obligation to consult and accommodate with respect to Treaty rights, British Columbia attempted to draw the line there. Aboriginal rights (including Aboriginal title), they argued, were in a different category than Treaty rights. These rights had to be established on the particular facts of each case. Until they were established, the Crown owed no legal obligation with respect to these rights.

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The argument has a formalistic appeal. As the Crown noted, the obligation to consult, accommodate, and compensate with respect to Aboriginal rights had generally been viewed as an aspect of the justification stage of Section 35 analysis. The Courts only reach the justification stage once the Aboriginal right in question has been proved and an infringement of that right has been made out. Accordingly, the argument went, Aboriginal Nations must first establish those rights through Treaty negotiation or litigation before the Crown was required, at law, to alter its regular course of conduct to reflect the right in question.

The formalistic logic underlying this approach was ultimately undermined by its far-reaching and, arguably, negative implications. Aboriginal Nations lacking the resources to litigate Aboriginal title would have to sit back and watch the Crown undertake what they saw as systematic infringement of their constitutionally protected rights.

Further, the Crown's approach would seem to promote litigation over negotiation by placing a premium on a Court determination of Aboriginal rights and title. Finally, the approach would seem to denude Section 35 of any purpose or protective content. All of these considerations led the British Columbia Court of Appeal to reject the Crown's "proven rights" approach in *Haida* and *Taku River Tlingit.*

Both these cases involved provincial decisions concerning resource use on Crown land. In both situations the Aboriginal Nations had provided significant evidence of Aboriginal title but had not established these rights through litigation. The Court held that the Crown's obligation to consult and accommodate extends to Aboriginal Nations who assert a *prima facie* case to Aboriginal title. In *Haida* the Court went further, the majority holding that, in some circumstances, the third-party licencee, itself, may owe an independent legal obligation to accommodate the interests of the First Nation.

The Supreme Court of Canada has already heard appeals in the *Haida* and *Taku River Tlingit* cases. Decisions are expected later this year. Early next year the Supreme Court of Canada will hear an appeal by the *Mikisew Cree First Nation*, which will put to a test some fundamental principles established by the British Columbia Court of Appeal in *Halfway*. Companies could simply wait to determine whether the Supreme Court of Canada will relieve the Crown of the lawful obligation to respect Aboriginal and Treaty rights in the context of land and resource decision-making. It is, in the view of the writer, doubtful that Canada's highest Court will adopt this approach.

While the scope and nature of the legal obligations will no doubt be profoundly affected by the reasons of the Supreme Court of Canada, a blanket rejection of the position taken by the Aboriginal Nations in these appeals would be a very significant departure from the Supreme Court of Canada's approach to Aboriginal issues.

A more proactive approach by business would be to recognize that, for years to come, unresolved Aboriginal issues will be as much a part of the landscape of British Columbia as its mountains and rivers. Some day these issues will be resolved by litigation or through negotiation. In the

meantime, however, resource and land-use decisions must proceed.

Are there steps that a business can take to avoid losing its property right due to the failure of the Crown to meet its constitutional obligations? Are there ways for business to eliminate the possibility that a Court will hold that the business itself has assumed legal obligations to a First Nation when purchasing interest in land or resources?

Many businesses in British Columbia have found that the answer is "yes." They have found it is entirely possible to sit down with Aboriginal Nations and work out how Aboriginal and business interests can co-exist or, even better, can complement each other. The strategies employed have included the following.

1. Joint Ventures

Many companies have negotiated joint ventures with Aboriginal Nations. This way the Aboriginal Nation obtains a share of the resource and land revenues generated from its traditional territory. The company obtains legal stability and, at times, a level of environmental and international credibility that the company may otherwise lack.

2. Funding the Consultation Process

Aboriginal Nations face enormous demands for information from a host of government entities and resource companies. A company seeking to operate successfully within an Aboriginal Nation's traditional territory may fund a liaison position within the community or provide direct funding to support the consultation process. In the end the investment may be a very sound one, promoting a healthy atmosphere of trust and a streamlined consultation process.

3. Direct Contribution

Companies make direct financial contributions to non-Aboriginal communities all the time, providing major financial support to arenas, theatres, festivals, and the like. Companies do this to fill their role as good corporate citizens: they are giving back something to the communities. There is every reason to extend this direct support of Aboriginal Nations in whose territory the company seeks to operate.

4. Employment

Many Aboriginal Nations in the province live with levels of unemployment that would, in any other community in the country, be considered a national crisis. An investment, from the outset, in training and employment of Aboriginal Nations' members can pay dividends in terms of an improved relationship with an Aboriginal Nation and the development of a stable local workforce. Thinking of the issue from another perspective, if the company employs a smaller percentage of the local Aboriginal workforce than it does of the local non-Aboriginal local workforce, it would not be surprising for the company to have a problematic relationship with the Aboriginal Nation in question.

5. Taking Aboriginal Rights Seriously

Progressive companies throughout the province are negotiating comprehensive accommodation agreements with Aboriginal Nations. Typically these agreements provide Aboriginal Nations with training, employment, direct financial benefits from the commercial activities, as well as some involvement in important aspects of the decision-making process. Companies can't change the history of British Columbia but they can certainly change the present. Acceptable agreements will normally provide Aboriginal Nations with economic benefits and involvement in the decision-making process that will affect their Territory.

British Columbia will need a lot of time to address the failures of the Crown to deal honourably with Aboriginal Peoples during the Colonial period and since. In the meantime, land and resource-related industry will proceed. Successful businesses will find a way to forge positive relationships with Aboriginal Nations that will provide a solid foundation for future growth and prosperity. ▲

Allan Donovan has practised primarily in Aboriginal law for the past 15 years. His firm, Donovan & Company, practises exclusively in the area of Aboriginal law including litigation, Treaty negotiation, specific claims, negotiations with government and industry, and commercial and economic development.

Voice: 604 688-4272
Fax: 604 688-4282
allan_donovan@Aboriginal-law.com
www.Aboriginal-law.com