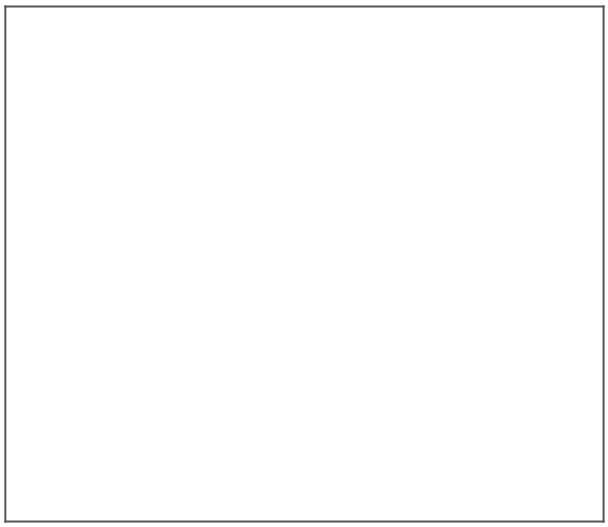
Aboriginal Law for Resource Developers

published 08/27/2008

In its broadest sense, Aboriginal law is the law concerning Aboriginal people; thus this area of law touches on many other areas of law such as property law, constitutional law, or family law. For resource developers, the area of Aboriginal law of most importance deals with Indigenous rights. Indigenous rights are treaty rights, Aboriginal rights, and Aboriginal title rights that Aboriginal people (be they First Nations, Inuit or Métis) have over Canada, which are protected by s. 35 of the Constitution Act, 1982.



A basic understanding of these three types of rights is essential for resource developers. In the Prairie Provinces, the most frequently encountered Indigenous right is that of treaty rights. These treaties were entered into between Canada and various First Nation communities in the late 19th Century or early 20th Century. The text of the treaty defines, to a large extent, the rights exercisable by both the First Nation community and Canada. Commonly, these treaties recognize and protect a First Nation community's right to hunt, trap or fish within its treaty territory. The Natural Resources Transfer Agreement (also known as The Constitution Act, 1930) served to extinguish treaty rights to commercially hunt, trap and fish, but expanded the area in which a First Nation community could exercise the right to hunt, trap and fish for food from the treaty territory to all of the Prairie Provinces.

Unlike treaty rights, Aboriginal rights and Aboriginal title arise from the fact that Aboriginal communities lived in Canada before

the arrival of Euro-Canadians. Aboriginal title is an Aboriginal community's right to exclusive possession to their traditional territory. Aboriginal title is held by the community and not by individual Aboriginal people. The Aboriginal community can do anything it wishes with the land, but it cannot use the land in a manner inconsistent with their traditional association with the land. For example, if the land was used as a hunting ground, it cannot transform that land into a strip mine. Finally, the Aboriginal community cannot transfer its interest in the land to anyone, but the Crown. In contrast, Aboriginal rights are those rights short of title. Commonly, Aboriginal rights are rights to hunt, trap or fish (either commercially or domestically) over the community's traditional territory.

The legal tests used to show the existence of Aboriginal title or Aboriginal rights differ. Aboriginal title is proven if, prior to the assertion of British sovereignty, the community had exclusive possession over the land in question. Aboriginal rights are proven if, prior to contact with Europeans, a given practice or custom (e.g. hunting) was integral to the culture of the Aboriginal community. Before the Supreme Court decision in R v. Powley, the test for Aboriginal rights posed a problem for the Métis as they did not exist before contact with Europeans. Due to Powley, the time to determine if a practice or custom was integral to the Métis group is at the time Europeans took effective control over the Métis area in question.

Indigenous rights, especially Aboriginal rights and Aboriginal title, can take many years to prove in court. Pursuant to the Supreme Court decisions in Haida Nation and Taku River, the

Crown owes an Aboriginal community a “duty of consultation and accommodation” when the Crown is considering an action (such as issuing a development permit) that may affect Indigenous rights, though the right may not have been formally proven in court. The Crown must consult with the Aboriginal community about the proposed action and get the community’s input. If the Crown does not consult or does not consult adequately, resource development projects can be held up as Aboriginal communities assert their rights in court.

While this duty is something born by the Crown, it makes good practical sense for resource developers to engage in its own consultation with Aboriginal communities. In this way, resource developers will have a better idea as to the potential issues that may arise and can formulate ways of accommodating them even before a regulatory process-- either under an environmental act or pursuant to this duty of consultation-- commences. It also allows resource developers the opportunity to gain an ally in an Aboriginal community when proposing a project.

In the end, consultation with each Aboriginal community is unique. No two communities are alike, in fact different communities may have conflicting interests. However, the basic principles of Indigenous rights frame a large portion of the discussion.

