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ARTICLE

Coming of Age; Remodeling First Nation and Industrial Consultations,

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Next to physical survival, the greatest need of a human being is psychological survival – to be understood, to be affirmed, to be validated, to be appreciated

– Steven Covey.

This simple, yet prophetic understanding, lies at the root of First Nations / Industrial relations. For amidst the chaotic clash between industrialized Capitalism, legal requirements, and Politics, exists the simple reality that common human psychology, remarkably gets lost. To appreciate the point of this a little better, one must first appreciate the circumstances which have led to the chaotic clash in the first place.

In 1982, Canada affirmed and validated itself by enacting the Constitution Act of 1982. This effectively gave Canada sovereignty from Britain to enact its own laws and define its own human rights. Along with this came the first affirmation and validation Aboriginal People have experienced since the signing of the infamous Treaties at the beginning of the twentieth century, by entrenching Aboriginal Rights into Canadian Law. Unfortunately, the definition of these Rights were never clearly laid out. Though the validation of Aboriginal Rights through affirming them into law is a monumental achievement for Aboriginal Peoples, the failure of Canada to define those rights over the past 24 years, has proven to be destructive to the very relations the Constitution was attempting to liberate in the first place. By inspiring Canadians to on one hand, recognize the uniqueness of Aboriginal People, while on the other hand leaving the definition of this “uniqueness” open to interpretation, this formula has created a politically challenged and chaotic legal quagmire.

Amidst this quagmire, Canada’s leading industry, Natural Resources, was, and has been struggling to not only survive, but thrive as well. Our Natural Resource Industry is immensely cash intensive, and by nature dependent on stability to secure the investments needed to grow these businesses, especially in a global economy. Understanding this, and the aforementioned quandary, one can naturally begin to appreciate the myriad of conflicting interests that would inevitably develop, and the ensuing confrontations that would logically follow.

While government is ultimately responsible for implementing law and regulations associated to the economy and its respective industries, it is also ultimately responsible for managing the Rights now

EVOLVING FIRST NATION, GOVERNMENTAL, AND INDUSTRIAL RELATIONS TO FRESH NEW LEVELS

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afforded Aboriginals through the Constitution. While the commercial enterprises composing the Natural Resource Industry in Canada manage the volatility of being dependent on a commodity market for revenue, and the stock market for operating cash, they have ultimately been left with the struggle of mixing these usually coherent business factors, with the usually incoherent Politics of social development. While Aboriginals struggle to repair the damage done by hundreds of years of Paternalism and look to begin the forging of their new, more economically orientated futures, they are bounced in perpetuity between both government and industry, while everyone argues about who is responsible for what. The ensuing result is that because Aboriginal rights remain largely undefined, and while everyone is left to pass the buck on who is responsible for what, everyone has been left to the never ending legal gymnastics of what I would affably refer to as "Interpretation Engineering". The Courts by nature will resist being used as a means to define policy (or Rights) and will pass judgment on the law as it stands, while occasionally "directing" judgements to influence Policy. What we end up with is what we actually have. A long, arduous, complicated, expensive, and very slow process to stabilization of the requirements associated to Aboriginal Rights. In the meantime, Aboriginal People continue to experience the frustration of minimized results associated to their freedom. Government continues to bear the disfunctionality associated to managing the undefined political needs of the Aboriginal Community and the quite clearly defined economic development needs of the Industry. While the Industry continues to bear the ultimate risks associated to the introduction of all this instability in their business environment.

Since the inception of the Constitution Act of 1982, people have generally embraced this legalized and confrontational approach. Interestingly enough, while some will argue the minimal advancements since then, most will concede that some twenty four years later, we are no farther ahead now then we were then. I am reminded of the old adage, "the definition of insanity is doing the same thing over and over again, while expecting a different result". In this case, while change is clearly in order, some still are left debating how much of it is actually required. Certainly, though at the very least, most can agree that the approach itself needs and should be changed.

With a general understanding of how the current circumstances have developed, we can now step back and begin to reflect on the issues themselves and means by which we can manage them best. One of those undefined Aboriginal Rights, and subsequently one of the immediate flash points, is that of the Right for consultation. Interestingly, the very definition of consultation lends itself to many interpretations, and of course is subject to "Interpretation Engineering". For example, the Supreme Court of Canada has declared that Aboriginal Peoples must be "meaningfully consulted". Though at first glance the well intentioned would likely think that this is not so bad. A Doctor for instance, would feel that having a meaningful consultation with a Patient to explain his prognosis and seek the Patients direction, is common place and easily achievable. The not so well intentioned however, will throw their hands in the air and proclaim that this is not clear enough to proceed. They will cite generalizations like, what is meaningful for one may not be meaningful for another, or what is common sense for you may in fact be non-sense for me. Thus, when the Right remains undefined as in this case, the door is left wide opened to those who feel they are better served through "Interpretation Engineering", then they are in taking the more sincere approach of the Doctor.

Absent of a clearly defined definition, and recognizing the need for change, one is left to ask, what can be done? To answer this, one needs to appreciate first what is at the source of the differences between what is actually being done for Consultation and what is desired. The most significant difference being the recognition that there exists a great cultural divide between how Aboriginal People live their lives, and how business is managed. Business and North American Society are structured around Capitalism which is economically driven and centered around the "survival of the fittest" ideology. Whereby Aboriginal Society is structured around Socialism centered around placing the priority on the community as a whole versus any given individual. The point being not to judge the differences between the two concepts, but to see the need to address the differences as they relate to the question at hand. In doing this through my experiences, I have noticed three main elements which consistently appear to be at the heart of Consultation disputes with First Nation communities:

- The drawing of territorial lines and borders,
- Insufficient time allotted to perform the exercise,
- A lack of a distinction between formal and informal Consultations

In flushing each of these points through, we see that first, in a capitalistic society, lines, borders, and fences are a normal way of life. Since the concept is individually orientated, it is the natural means for an individual to stake his claim. When I first bought my 140 acre Horse Ranch, the first thing I did was proudly place a fence around it to draw a line around what was mine. In a socialistic society premised on the interests of the community as a whole, there are few if any borders, lines, or fences. In fact, if you visit the typical Native Reserve, you will be hard pressed to find any fences at all. This is not to claim that one concept is better than the other, but to illustrate a conflicting difference between the two.

When Europeans settled in North America of course they brought the Capitalist way of doing things with them. They began setting up fences and marking territory. For the Aboriginal Community this was the first clash between them and the new comers. For Aboriginal People do not view the earth as something anyone lays claim to, but as something that is there for all people to share. Certainly, as Clans of Aboriginal People wandered across the land they knew where other Clans were. Out of courtesy, and respect for a particular Clans dependency on a given piece of geography, they would first make a visit to those communities to announce their presence. Outside of that given piece of geography which one community may be dependent upon, as Aboriginals, their cultural teachings saw them share the vast expanses in between. For an Aboriginal, taking ownership of a piece of earth was, and remains, sacrilegious as they believe that earth is a means of survival requiring respect, not dominance.

Even to today, one of the greatest sources of conflicts with Aboriginal People is the conflict of placing lines and borders around land that was traditionally shared. Though this is a natural occurrence in the non-native society, it is not a fit in Aboriginal Society. Any consultation predicated around seeking the input from one Aboriginal Community, while excluding another under the pretense of delineated territories, will almost always be a failure.

Secondly, we see that in business and non-native society today, time is of the essence. Everything moves at breakneck speed as we all race one another for the proverbial "top of the hill". It's a matter of survival! In the Aboriginal Community time is not only not of the essence, but something in which there is plenty of. Add to this the traditional sustenance lifestyles of Trappers and aboriginal heritage, and simply getting notice to someone for anything could take a week or more. When one recognizes the socialistic desires to involve the whole community in decisions being made regarding the land, and the aforementioned logistical challenges, one only begins to appreciate the stark contrast between the two cultures concepts of time. Any Consultation predicated upon unrealistic timelines almost certainly will fail.

Thirdly, we see that despite the humble beginnings of Aboriginal People, their world today in many respects has become more complicated than ours. Over the past Century, and in particular the past twenty four years, Aboriginal people have lived in a legalistic vacuum where they have adapted to become proficient at "Interpretation Engineering". In this they have learned to converse one way with the average citizen, while in quite another with anyone exhibiting any type of official authority. Once appreciated, understanding when a conversation will be perceived as formal and when it will be perceived as informal, will make the biggest contribution to successful Consultation.

In a bold and unprecedented move, a small community of Algonquins, The Anishinabeg of Kakinwawigak, located at Winneway, Quebec, have chosen to change how consultation is done with them. Officially registered as The Long Point First Nation, this determined community recognized that the current way in which the government and Forest Industry were "consulting" with them was not working. After decades in

the Courts and countless crisis's with industry and government, they decided to create their own process. One that would not only satisfy their interests and rights, but the interests of the industries they are striving to take part in, and effectively take Consultation to the next level. In fact what they decided was that Consultation needed to be remodeled. In April 2004, acting as the Chief Negotiator for Long Point amidst a convoluted and frustrating negotiation with Quebec, we decided to begin to place our focus on this new initiative.

To make this work, it had to first be accepted that for change to happen, there needed to be a differentiation from the legal vacuum which was at the root of the current way of doing things. To do this, we had to strike a critical balance between assessing what were the catalysts to invoking the legal system, and maintaining what were Long Point's interests at the end of the Day. With this premise as the foundation, Long Point created their own unique process whereby the Company wishing to perform development activities on Long Point territory, would first be required to make an application for such to Long Point. Long Point and the Company would then work together on the application to ensure all was completed accordingly. The application would then be reviewed by Chief and Council where they would ratify it and provide a Permit to the Applicant to perform the Activities as described therein. The Process can be summarized as follows:

- **There Is No Jurisdictional Relationship.** The process is an additional process above and beyond what governments currently choose to apply. It is enacted within the framework of a Band Council Resolution, and therefore there has no "Land Claim" component requiring Legal interpretations. The Process makes no attempt to replace any current government regulations or Protocols. It is simply an enhancement to what already is in place.
- **No Lines Are Drawn With Other Aboriginal Communities.** Long Point makes no claim that they're Process is the exclusive tool for granting permission to Applicants to perform Development on a given piece of Land. In fact, Long Point has created an element in the Process which requires the Applicant to ensure it has gained the support of the other affected First Nations for the Permit to be valid.
- **The Process Is Structured Off Of The Most Prestigious Forest Products Certification Board In The World, Forest Stewardship Certification.** As this is the standard in which the majority of the Forest Industry are reaching for (including those with whom Long Point does business), there is a vested interest in making it work,
- **The Process Encourages An Applicant To Do A Complete Five Year Plan In One Application Process.** This effectively eliminates the time struggle created by attempting to perform Consultations every year at the implementation stage of the five year plan. Doing all the work up front during the five year strategic planning phase is more in line with where the Courts expect consultation to take place, and, it provides great flexibility with many more options to fostering smooth running operations.
- **An Innovative Dispute Resolution Process Is Included.** A mechanism is included to resolve differences in a manner which both Parties are comfortable. For the First Nation, an aboriginal dispute mechanism is included allowing resolution to problems to be mutually and satisfactorily resolved. Currently, either the Company or the Government make arbitrary decisions associated to these disputes which in itself is at the source of great frustration to the First Nation. This mechanism is key as it allows the First Nation the ability to have objective resolution to their concerns, while fostering a more legitimate role for them in development. As important, the Company also has a mechanism to ensure that if there efforts to resolve matters mutually, fail, then a tool exists to prevent impasse.

- The overall concept is to take what is already being done by companies anyway, and remodel it to provide the Aboriginal community the added benefit of a more active and legitimate role in development, while providing the company the added benefit of actual proof in the form of a Certificate that they have done their work and have obtained the support of the First Nation. Regardless of the current situation, Companies are currently required to consult with First Nations on their Forest Planning. This process takes this requirement, and legitimizes it for the Aboriginal Community. In effect, it is their own process, stages of interaction and dialogue have been included before decisions are made, and when decisions are made, they are not made arbitrarily but objectively. With this buy in, with the key procedural changes to manage previously conflicting elements of the process more effectively, and with the certified proof and more effective timelines received by the company, this is a pioneering process which places basic human psychology in the forefront, while establishing a mutual vested interest in making it all work.

Despite all of this, and despite Long Points admirable determination, success was greatly dependent on Long Point finding a company who not only shared their determination for creating more effective change, but who was also bold enough to try a new and unknown approach. Tembec Inc., long considered an innovator in Aboriginal / Industrial Affairs, stepped up to the plate when invited, and represented the final piece of the puzzle.

Using Long Points Permit Process (or consultation process) identified above as the foundation, Long Point and Tembec negotiated an agreement between themselves which incorporated Tembec's needs respectively. The result is an agreement which is able to preserve Long Points Process while adding elements that incorporate Tembec's operational logistics. For example, In the new agreement there are provisions which account for Quebecs' Consultation funding protocols, required to perform the agreement obligations.

What exists now between Long Point and Tembec is an agreement which is unprecedented as far as we understand. It is an arrangement whereby a shift has taken place regarding how forest planning is actually administered. Where previously, all that was available was the current government system which positions the Company as the central interest, while providing other Stakeholders mechanisms to try and work their interests in. Now, in addition to the current government processes, the Company has the onus to approach the First Nation and apply to them, through their own process, effectively shifting the First Nation from simply being another Stakeholder, to now being more of a Steward. What makes this so unique is that while having to share some of the historical control over planning, the Company in fact stabilizes its operations by creating great efficiencies in time, while gaining the security of a certified endorsement of their efforts directly from the community.

In a region where the forest Industry was and remains engulfed in perpetual and expensive confrontation with First Nations, Tembec and Long Point can breathe a sigh of relief. Together, they can now look forward to reaping the rewards of their mutual determination to find constructive change.

Twenty four years ago marked the inception of the Constitution Act of Canada 1982, which saw Canada finally assert their sovereignty from England, and saw Aboriginal People finally receive the validation they deserved. After spending these twenty-four years consumed by the destructive behavior of "Interpretation Engineering", like three boys in a school yard holding each other in a headlock while their Bus is about to leave without them, necessity has forced a solution. The understanding of how the common human psychology of being involved and having an arbitrary means to resolve differences before a final decision is made, provides the Aboriginal Community with the psychological survival of being understood, affirmed, validated, and appreciated. In return for satisfying the Aboriginal Community's natural need for psychological survival, the Company has secured the stability and efficiencies it so desperately needs. All of which without Lawyers, Judges, and "Interpretation Engineering".

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Oliver Wendell Holmes once said, "greatness is not in where we stand, but in what direction we are moving ...". While The Long Point First Nation and Tembec Inc. break the trail for others to follow, one thing is for certain, change need not be feared in this case, but embraced.

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