



Planning and regulatory considerations in foreshore development



MillerTiterle
+Company

Presented by Olga Rivkin and Jana McLean

February 18, 2016

Overview and objective

- What to consider when approaching a foreshore development project
 - Who owns the foreshore?
 - Who regulates the foreshore?

Who owns the foreshore?

- Foreshore is an area between the high water mark and the low water mark
- *Land Act*, section 55: Province owns land below natural boundary (i.e., visible high water mark)
- Province owns the seabed under the Strait of Georgia, Strait of Juan de Fuca, Johnstone Strait and Queen Charlotte Strait
 - Reference re: Ownership of the bed of the Strait of Georgia and related areas, [\[1984\] S.C.J. No. 21](#), [\[1984\] 1 S.C.R. 388](#) (S.C.C.)
- BUT: public harbours are federally owned/some areas are privately owned (historic)

Keep in mind riparian rights

- Riparian owners: owners of land bounded by water (for simplicity, all water bodies)
 - protection from erosion
 - ownership of naturally accreted land (must apply to survey – see section 94 of the *Land Title Act*)
 - access to and from the water

Who regulates foreshore use?

- Multiple jurisdictions:
 - Federal (fisheries, environmental assessment)
 - Provincial (land tenure, water laws, riparian environment, etc.)
 - Local government (zoning/planning/building)
 - First nations

Federal Environmental Laws – Foreshore Development

- + Environmental Assessment?
- + *Fisheries Act* – current law and change ahead?
- + *Navigation Protection Act*
- + *Species at Risk Act*
- + Federal Building Code

Change is in the air!

- + Liberal election promises:
 - Review of Canada's federal EA process
 - Climate change leadership
 - More protection for freshwater and oceans
 - Invest in / protect National Parks
 - Invest in clean technology producers
 - Recast relationship with Aboriginal peoples

New Federal Government Position:

- EAs in areas of federal jurisdiction; include upstream impacts and GHGs
- Avoid provincial duplication
- End federal Minister inference
- Modernize NEB
- Integrate Indigenous legal traditions and perspectives
- Satisfy Crown's duty to consult, accommodate and obtain consent
- Review Conservative amendments to *Fisheries Act* and *Navigable Waters Protection Act*

Federal Environmental Assessments?

- + **Key Changes in 2012:**
 - New trigger for federal EA
 - 2 types of EAs only
 - New responsible authority
 - Emphasis on timing
 - Focus on federal jurisdiction:
« environmental effects »
 - Cabinet Role
 - Delegation to Provinces



Fisheries Act

- + No deposit of deleterious substance in waters frequented by fish
- + No “serious harm” to “fish that are part of commercial, recreational or Aboriginal fishery, or fish that support such a fishery

“Serious harm” = death, permanent alteration to / destruction of habitat

- + More inspections / investigations
- + Due diligence!



Posted at
Espangrlish.com

Navigation Protection Act

- + 3 oceans, 97 lakes and portions of 67 rivers regulated
- + May add waterway if:
 - National or regional economic interest
 - Public interest, or
 - Request of local authority
- + Administrative monetary penalty
- + Director liability



Aboriginal/First Nations Interests

- + Duty to Consult and Accommodate
 - Decision that may impact known or asserted Aboriginal right, including title
- + Free Prior and Informed Consent?
- + Ownership of water, fish and aquatic resources?
- + Business Interests

Provincial regulatory regime

- *Fish Protection Act and Riparian Areas Regulation* (soon to become *Riparian Areas Protection Act*)
 - Enables local governments to require Qualified Environmental Professional's report to assess setbacks
- *Water Sustainability Act*
 - Licensing/authorizations – including for works in and about stream

Local government regulatory regime

- Letters patent set out area of jurisdiction
- Zoning – including the use of water lots
- Development permits (hazardous areas/riparian areas/environmentally sensitive areas)
- Building permits
- Exception: federal undertakings

- When considering a foreshore development ask yourself this:
 - Who owns the foreshore area?
 - Are there any riparian rights that may be affected?
 - What regulatory requirements/permitting requirements apply – federal/provincial/local