The Evolving Role of Indigenous Nations in Environmental Regulation in BC

January 27, 2022

Outline

- Context:
  - Aboriginal rights, aboriginal title
  - Legal regimes for land in BC
  - UN Declaration on the Rights of Indigenous Peoples (UNDRIP)
  - BC legislation – (i) *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), (ii) *Environmental Assessment Act* (EA Act 2018)
- Examples of agreements between BC and Indigenous Nations, regarding environmental regulation:
  - Tsilhqot'in Stewardship Agreement (on aboriginal title lands and surrounds)
  - Lake Babine Nation Agreement (pursuant to EA Act 2018)

Context – Aboriginal Rights and Title

- s. 35 of the *Constitution Act, 1982*
  - The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed
- Aboriginal Rights
  - Vary from group to group
  - Involve an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right; and
  - Have continuity with the practices, customs and traditions that existed prior to contact with European society (***R. v. Van der Peet,* [1996] 2 S.C.R. 507)**
  - E.g. use of natural resources, such as hunting, trapping, fishing, forestry …

Context – Aboriginal Title

- Aboriginal Title
  - the right to exclusive use and occupation of the land … (***Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010**)
  - Unique
    - arises from possession before the assertion of British sovereignty, as distinguished from other estates such as fee simple (private land) that arise afterward
    - A collective form of title, not individual – held by an Indigenous People
    - inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown
  - Specific areas of aboriginal title to be defined either by modern land claim agreements or in court

Context – Legal Regimes for Land in Canada

- Historic Treaties - early 1700's -1900's, large portions of Canada, including NE BC (in Treaty #8 - 1899) Treaty 8 right to hunt, trap, gather. Crown right to take up land. Duty to consult.
- Modern Land Claim Agreements - 1975 onward, mostly in northern Canada and some small areas of BC
  - Typically address both land and governmental powers; may specify how an Indigenous Nation will participate in regulatory decision-making e.g. in respect of environmental matters & natural resource decisions within various zones
- Non-treaty Areas - mostly in BC in areas where no historic or modern treaties. Some areas of BC are subject to land claims by multiple Indigenous Nations
  - Crown duty to consult. Potential for BC to enter agreements with Indigenous Nations regarding decision-making/participation in environmental and natural resource matters
- Aboriginal Title Areas (litigated in court) - very long process, complex, expensive, no guarantee that a specific title area will be declared by the court
  - Tsilhqot'in Nation has aboriginal title lands in the interior of BC

Context – Involvement in environmental regulation varies

- How Indigenous Nations are involved in environmental regulation varies in different areas within BC
- Case law – consultation and accommodation (e.g. non-treaty areas, Treaty #8); agreements apply in some areas.
- Recent case *Yahey v. British Columbia,* 2021 BCSC 1287 (a.k.a. Blueberry River First Nations case) decided in Treaty #8 area
  - requires negotiation with Blueberry, and new approach by the Crown in Treaty #8 area to approve new authorizations;
  - interim agreement with Blueberry paused certain approved authorizations for oil & gas and forestry (where activity had not started), pending further negotiation and agreement from Blueberry
  - Negotiations with other Treaty #8 nations
- New BC legislation also expressly provides for involvement in and/or agreements regarding environmental regulation

Context – UNDRIP and FPIC

- UNDRIP Art. 32, 2. States shall consult and cooperate in good faith with the indigenous peoples concerned … in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources ...
- UNDRIPA (2021) is the federal Act to implement UNDRIP in the laws of Canada – not going to discuss this further today
- DRIPA (2019) -the BC Act to implement UNDRIP in the laws of BC
  - in consultation & cooperation with the Indigenous peoples in BC, the government must take all measures necessary to ensure the laws of BC are consistent with the Declaration;
  - Action plan, annual reporting
  - Decision-making agreements (s. 7) – KEY POINT

BC Legislation - DRIPA

- DRIPA s. 7:

  For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

  (a)the exercise of a statutory power of decision jointly by

  (i)the Indigenous governing body, and

  (ii)the government or another decision-maker;

  (b)the consent of the Indigenous governing body before the exercise of a statutory power of decision.

BC Legislation – EA Act 2018

- First move to implement UNDRIP (passed 1 year before DRIPA, came into force shortly after DRIPA)
- Purposes of the Environmental Assessment Office (EAO) include supporting reconciliation with Indigenous peoples in BC by:
  - (A) supporting the implementation of UNDRIP,
  - (B) recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves,
  - (C) collaborating with Indigenous nations in relation to reviewable projects, consistent with UNDRIP, and
  - (D) acknowledging Indigenous peoples' rights recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision making under this Act.

BC Legislation – EA Act 2018

- Fundamental changes to how Indigenous Nations are engaged in the EA process, including opportunities to express consent or lack of consent
- Focus on consensus building and on collaboration with Indigenous nations as government
- Dispute resolution mechanism contemplated (e.g. to resolve differing views among participating Indigenous Nations)
- Government makes the decision whether to approve a reviewable project, however
- Reviewable projects may not proceed without consent if they are:
  - (i) on treaty lands where consent is required under the final agreement OR
  - (ii) in an area subject to an agreement between the provincial government and an Indigenous nation under which such consent is required and the agreement has been prescribed by the LGiC (s. 7)
- Minister may enter agreement allowing substitution of Indigenous Nation's EA process for BC EA process if certain conditions are met

Statutory Decisions

- Decision set out in legislation
  - Environmental assessment certificate
    - *Environmental Assessment Act 2018*
  - Waste discharge authorization
    - *Environmental Management Act*
  - Water license
    - *Water Sustainability Act*
- Decision makers are bound by what is in the legislation
  - *Who* gets to make the decision
  - *What* they get to consider
  - *How* they get to decide

Participant Rights

- Statutory decision makers also have to ensure certain crucial participant rights are complied with
- Participants have rights to:
  - Understand the case that they are participating in
  - Make their views about the case known to the decision maker or other participants

Statutory Obligations

- Statutory obligations – like making decisions – remain with the government unless the enabling legislation says otherwise
  - Statutory actor cannot delegate their responsibilities without clear statutory authority
- The former EA Act did allow for some agreements

Prior forms of agreement

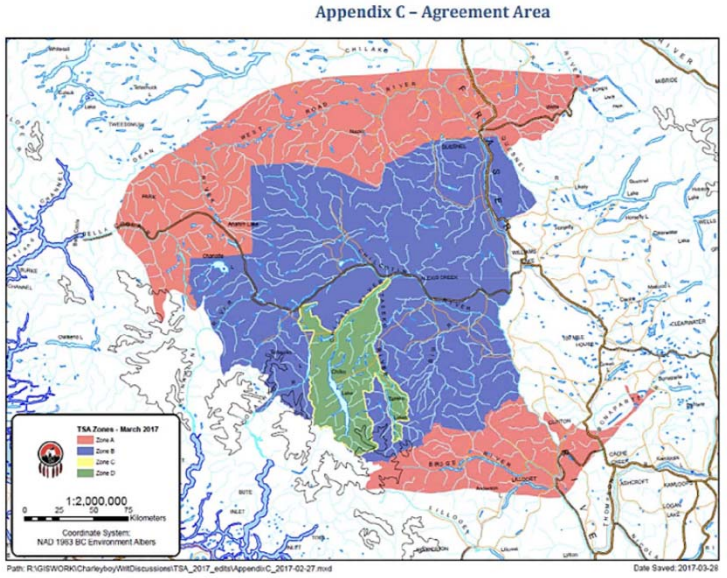
- Aspirational
  - “we hope to achieve”
  - “we seek to embody these values in our continued work together”
- Agreements or often MOUs Explaining how the parties will work together rather than delegating or sharing roles, responsibilities, rights or obligations
  - not usually modifying existing legislative rights or obligations
- We could consider these more of “good faith” agreements

Why is this important?

- **Aspirational Agreements**
  - Can assist in building excellent community relationships.
- **Substantive Agreements**
  - May change what is set out in legislation
- With the new scope of Crown authority, there may come more of these

Tsilhqot’in Stewardship Agreement

- Tsilhqot’in Stewardship Agreement is a good example of an important agreement between the provincial Crown and an Indigenous nation which does not delegate rights from a statutory decision maker



Characteristics of Agreement

- Tsilhqot'in entered into agreement to have more say in resource development
  - Reference: https://www.tsilhqotin.ca/stewardship/
- Relates to activities that could impact upon land/resources that form part of the Tsilhqot'in's recognized Aboriginal rights
- Four levels of engagement that ensure members of the Tsilhqot'in First Nation are able to have their concerns heard

Levels of Engagement

- TSA establishes four levels of engagement that increase in relation to the seriousness of the potential impact on Tsilhqot'in land and/or resources
- Appendix A, Engagement Process, s. 2.3:
  - "When Provincial Agencies become aware that they will be receiving Applications from third party Applicants, they will make reasonable attempts to encourage those third parties to provide relevant information related to the Application. **The Provincial Agencies will inform third parties of the Agreement and encourage third parties to contact the TNG to discuss any TNG land and resource polices that may assist the Engagement Process**"

TSA does not apply to all matters

- The TSA does not apply to the Court Case Zone
  - Instead, constitutional and common law principles
    - i.e. duty to consult
- The TSA does not apply to environmental assessments (Level 5)
  - But applicable to other permitting processes required for project

Lake Babine Nation Agreement

- On the other end of the spectrum is the Environmental Assessment Collaboration Agreement between Lake Babine Nation and the Province, signed on November 23, 2021, an agreement executed pursuant to s. 41 of the EA Act 2018.
- The agreement is the first agreement pursuant to s. 41 and sets out how the province and Lake Babine Nation will work together on future environmental assessment for projects in the Nation's territory or where there is a reasonable possibility that Lake Babine Nation or its Aboriginal rights and title could be affected by a project.
- It will apply to all projects that are subject to or may eventually be subject to the EA Act 2018.

Overview

- “This collaboration agreement is an important first step in restoring our Nation’s stewardship role for our yintah (our Territory and all the natural resources it sustains) in relation to major development projects,” said Chief Murphy Abraham of Lake Babine Nation.
- Lake Babine’s decision-makers will be Chief and Council. Whether Lake Babine will consent to an EA Certificate for a reviewable project will depend on the following criteria:

- The criteria that inform Lake Babine’s decision on whether they consent to issuing the EA Certificate under s. 29(2)(c) of the EA Act (2018) are:
- i. whether the project is sustainable for Lake Babine, its Section 35 Rights and its Territory;
- ii. whether the project includes sufficient and reliable measures to manage any potential negative socio-economic impacts on Lake Babine communities and members;
- iii. whether the project will bring significant benefits to Lake Babine, in keeping with the level of project impacts on Lake Babine, its Section 35 Rights and its Territory; and
- iv. whether the Proponent and Lake Babine are in a respectful relationship that includes significant Lake Babine involvement in the project, in keeping with the nature and level of project impacts on Lake Babine, its Section 35 Rights and its Territory.

Participating Indigenous Nation

- The EA Act 2018 provides that any Indigenous Nation may provide notice to the CEAO if the nation intends to participate in an assessment of a project
  - Section 14(1)
- The LBN Agreement is a confirmation that LBN will participate in all EAs in their territory
  - "Lake Babine intends to participate in all environmental assessments in accordance with this Agreement for reviewable projects proposed partly or wholly within the Territory, or where there is a reasonable possibility that Lake Babine or its Aboriginal rights and title recognized and affirmed under Section 35 of the Constitution Act, 1982 could be affected by a project" (Recital H)

Early Engagement

- If proponents engage with Lake Babine prior to filing their Initial Project Description, Lake Babine will make available – to the extent resources allow – persons who can engage with proponents
- Should proponents engage with the EAO, "the EAO will direct the Proponent to give adequate consideration to the [Schedules to the agreement] in preparing an Initial Project Description".
- A substantive difference from the EA Act is that the CEAO, pursuant to the agreement, must consider whether the Proponent has given adequate consideration to the Sustainability and Socio-Economic Frameworks in developing their Initial Project Description.

LBN entitled to increased communication

- There is a heightened level of communication
  - increased right to understand the case LBN must meet
- Compared to the regular requirements in the EA Act 2018, the agreement entitles LBN to increased levels of communication.
- For example:
  - an Initial Project Description is made public for a window of 80 days and an Indigenous Nation must contact the EAO
  - On the other hand, the EAO will notify LBN directly.

Increased communication, increased right to make views know

- Section 10, EA Act 2018, sets out the requirement for a proponent to submit a project notification where its project is not a reviewable project but which fits into a prescribed category of projects:
  - "A person who proposes a project that is not a reviewable project under the regulations under section 9 but is within a prescribed category of projects must, within the prescribed period, submit to the chief executive assessment officer a project notification"
- The Notification will be posted on EPIC for a public comment period.
- The LBN Agreement, however, provides a right to LBN to receive a copy of a project notification within 5 days of receiving it. LBN has a period of 30 days to make comments regarding the project notification.

Agreement adds clarity

- The LBN agreement doesn't always create rights. In some cases, the agreement fleshes out what is an otherwise grey area of an obligation that is owed to an Indigenous nation.
- For example, the CEAO is often obliged to "seek to achieve consensus with participating Indigenous nations". However, the EA Act 2018 doesn't advise us what that means exactly or how applicants can assist in getting to consensus

Clarity Example

- 27 (1)The proponent of a reviewable project for which an environmental assessment certificate is required may apply for an environmental assessment certificate in writing to the chief executive assessment officer.
- …
- (4)The chief executive assessment officer may accept a revised application for review …
- **(5)Before deciding whether to accept a revised application under subsection (4), the chief executive assessment officer must seek to achieve, with respect to the sufficiency of the application under subsection (4), consensus with participating Indigenous nations**.

What does the Agreement say?

- This previous section now means this in the context of the LBN:
  - EAO will advise LBN;
  - EAO will offer to meet to discuss the application;
  - LBN has a right to meet with the Technical Advisory Committee and to develop feedback to the proponent. CEAO will send feedback to proponent
  - After receiving the proponent's revised application, the EAO will provide it to LBN and seek to achieve consensus on whether the revised Application adequately incorporates the earlier feedback
  - If consensus isn't reached, the EAO, CEAO and LBN will meet and attempt to resolve outstanding issues before the CEAO accepts the revised Application.

Some thoughts

- Agreement thorough, well thought through and adding clarity
  - rules and considerations being laid out for all to see.
  - This is the premise of the Rule of Law – that we govern ourselves in all of these proceedings pursuant to rules rather than to the whims of a current person in charge.
- Theoretically be no surprises when doing an EA for a project that is partially or wholly in the Lake Babine territory.
- The considerations the agreement will require of a proponent can become a standard set of considerations, akin to any other permitting requirements.
- That they are considerations that can be known and responded to at the outset will enable good collaboration and good outcomes for proponents whose projects are partially or wholly in the territory.

- These were just two examples of the types of agreements the BC government is making with Indigenous Nations, to agree on how those Indigenous Nations will participate in environmental regulation in BC.
- With the expanded power to enter into agreements, we expect to see more of these.

THANK YOU FOR LISTENING

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