Engaging First Nations in Effective Project Based Consultation in British Columbia

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The following paper provides a brief overview of key aspects of engaging First Nations in effective project based consultation processes in British Columbia. "Project based consultations" are discussed here in the context of relatively large projects that are subject to the federal and/or the provincial environmental assessment processes within British Columbia.

The new *British Columbia Environmental Assessment Act* came into force in late December 2002, and changes to the *Canadian Environmental Assessment Act* have recently been implemented as a result of the CEA Agency's 5-year review of the *Act*. Even though the respective legislations' statutory obligations do not appear to be particularly onerous for project proponents, the common-law obligations have changed significantly as a result of recent case law in *Haida* and *Taku*. These changes will continue to have a fundamental bearing on the conduct of EA in British Columbia for the foreseeable future.

Partly in response to these legal cases, the Government of British Columbia issued the "*Provincial Policy for Consultation with First Nations*" in October of 2002. The *Policy* sets out general principles for consultation with First Nations and defines "aboriginal interests" as potentially existing aboriginal rights and/or title that have been asserted by a First Nation but have not been proven to be existing rights through a Court process. According to the *Policy*, until aboriginal rights and/or title are proven through a Court process, the Province (and most likely the federal crown with respect to projects in B.C) has an obligation to consider aboriginal interests in decision-making processes that could potentially lead to impacts on those interests.

Consultation efforts are to be made diligently and meaningfully, and with the intention of fully considering the aboriginal interests identified. The Consultation process should inform decision-makers of the possibility that the decision(s) that they make on proposed projects or activities may result in an infringement of aboriginal interests. A key consideration for decision makers is whether an infringement appears likely and, if so, whether efforts to attempt to address and/or reach workable accommodations of aboriginal interests are likely to be adequate to justify any such infringement.

Changes brought about by the recent case law, which are in-and-of-themselves somewhat undefined, raise several challenges for project proponents (and their consulting teams). On one hand, project proponents and government are bound to meet legal/policy obligations to consult while at the same time adhering to project priorities, timelines and budgets. This must

necessarily be balanced with the very real need to address First Nations needs and interests regarding consultation in a manner that is consistent with the principles set out by the courts and government policy. What this balance inevitably calls for is establishing positive working relationships with First Nations involved in the EA that engages them in a substantive way in the project review, design and development phases of project development. This in turn can raise issues with respect to human resource and financial capacity, and project delivery/approval timelines that present challenges for First Nations, proponents and government alike.

Why consult?

The courts have recently confirmed the need to consult with and seek to accommodate the interests of First Nations who have a good *prima facie* case of an aboriginal right or title **before** these interests have been proven in court. Importantly, the *Taku* and *Haida* cases have effectively changed the evidentiary basis upon which the duty to consult rests (asserted *vs* established rights) as well as the scope of the duty to consult. The duty to consult is now based on the assertion of aboriginal rights as opposed to the obligations being invoked after the Courts have recognized such interests. The strength of the obligation to seek an accommodation is proportional to the "soundness of the claim" of aboriginal title or rights.

In addition to the direction from the courts with respect to consultation, there are a variety of other societal forces focused on reconciling the interests of aboriginal people with those of the broader population. The ongoing BC Treaty negotiation process and the recent provincial Speech from the Throne are indicative of this broader government agenda. First Nations themselves are seeking broader recognition of their role in decision making/approval processes and of the special nature of the issues that they bring to the table. Increasingly, First Nations are seeking opportunities to raise issues of specific interests to them and to have them addressed in a substantive way. This is particularly the case with respect to the use of lands and natural resources within their asserted "traditional territory". Where projects are utilizing or potentially impacting such lands or resources, First Nations are seeking assurances that such activities are undertaken in a manner that protects their rights and integrates their views, interests, and priorities and that is of benefit to their communities from an employment and economic development perspective.

Consultation and EA

Simplistically, environmental assessment is about identifying potential project related impacts, designing means by which to avoid, mitigate or compensate for the predicted impacts, and establishing a program that ensures that these measures are implemented within project planning, design and development (construction / operation / decommissioning). As with environmental impacts, project development can similarly lead to potential impacts or infringements of aboriginal interests (rights). As such, there is an obligation on both the crown and the proponent to inform their decision making process with respect to any potential infringements on these interests. Consultation is a key mechanism to inform decision-making regarding potential impacts on aboriginal interests, to identify appropriate means by which to accommodate these interests, and/or to justify any infringements of these interests. At least conceptually, EA provides an operational framework for identifying potential project-related impacts on aboriginal interests, for establishing means by which to avoid, mitigate or accommodate for any impacts, and to establish a framework for implementation and monitoring.

First Nation Consultation Under BCEAA

In accordance with legal and policy requirements, the Province must consider aboriginal interests in relation to an environmental assessment to ensure that First Nation issues and concerns are identified, and the Province's legal obligations towards First Nations are met.

It is the policy of the Environmental Assessment Office (EAO) that First Nations with interests in the area of a proposed project (i.e., the project is in proximity to the First Nation's asserted traditional territory) or whose rights may be affected by a proposed project be provided the opportunity to be consulted by the proponent as well as by the EAO. The intent of this consultation process is to ensure that First Nation issues are identified, and that appropriate efforts are made to address the identified interests and/or concerns.

To accomplish this, specific First Nations consultation programs are established for each project within the broader context of the provincial Consultation Policy. This approach provides for greater flexibility to negotiate with First Nations in the manner in which they wish to be consulted. A typical EA review would include a pre-consultation assessment that identifies the relevant First Nations that may have interests that could be potentially impacted by a given

project and that should therefore be consulted with. Initial consultation with these First Nations will clarify the scope of issues be addressed and the process to be followed. A Procedural Order issued pursuant to s.11 of the BC *Environmental Assessment Act* will further clarify the specific consultation responsibilities of the various Parties over the course of the review process.

First Nation Consultation Under CEAA

Currently under CEAA there are no specific statutory requirements to consult with First Nations in relation to aboriginal or treaty rights. It is left up to project proponents and regulators to assess the "environmental effects (of the project) on current use of lands and resources for traditional purposes by aboriginal persons". The approach is somewhat discretionary and based primarily on the federal Responsible Authority's internal assessment regarding the potential for impact on use of lands and resources by First Nations for "traditional purposes". That being said, most federal departments have established consultation policies that have been implemented to address potential project related impacts on aboriginal interests. For projects that are subject to both federal and provincial EA processes, and therefore undergo "harmonized" environmental reviews, the provincial approach to First Nations consultation is that which primarily defines the consultation program undertaken in the EA process.

Consultation Principles or "Best Practices"

Aside from the specific and defined consultation requirements, the following consultation "principles" will assist in defining the overall approach to consultation with First Nations. They are provided as guidepost only and should be modified to reflect the specific circumstances under which the consultation process is being undertaken.

- Early Involvement – consultation efforts should be initiated as early in the project planning process as possible, before key opportunities to address First Nations interests have been foregone. Efforts should be focused on establishing positive, collaborative working relationships;
- Comprehensive approach – seek opportunities to involve First Nations in the design and implementation of relevant environmental studies and to incorporate traditional knowledge into baseline study programs. Focus on opportunities for

early identification of mitigation and/or accommodation measures regarding potential impacts on aboriginal interests;

- Flexible approach – each consultation process should be unique depending on the nature of the project and the socio-political structure and preferences of the First Nation(s);
- Provision / protection of information – the exchange of project related information is key to the success of any consultation process. Project related information must be provided in a format that is appropriate for the intended audience(s). This may require special mapping, "open house" meetings, site tours, etc. in addition to the more typical report format of information exchange. There may also need to be special arrangements made regarding the protection of "sensitive" information provided by the First Nations;
- Follow-up / ongoing consultation – in many cases, First Nations communities will need an opportunity to "digest" project related information and to have an opportunity to discuss related issues within their community. There should be a commitment to ongoing consultations to allow for this iterative process of information exchange to occur;
- Clearly defined outcomes - consultation processes should have clearly defined outcomes where each party is aware what the roles, responsibilities and expectations are. Consultation programs are often unsuccessful simply because the scope and intent of the consultations are either undefined or misunderstood between the parties.

  In many cases, formalizing the consultation process through a Memorandum of Understanding or Protocol Agreement can assist in defining the ultimate intent of the consultation process and well as roles, responsibilities, availability of resources, and relevant timeframes.

Summary and Conclusions

Recent case law has confirmed that there is a legal obligation to consult with respect to potential project related impacts on aboriginal rights and/or title and to seek to address and/or accommodate those interests. This duty has been newly defined and expanded by the *Haida* and *Taku* cases, both of which are currently under appeal at the Supreme Court of Canada. In the interim, the implications of these cases will continue to have a significant impact on the conduct of EA in British Columbia. While the requirement to consult applies broadly to all land and resource activities that potentially impact upon aboriginal interests, EA can be seen to provide an operational framework for identifying potential project-related impacts on aboriginal interests, for establishing means by which to avoid, mitigate or accommodate for any impacts, and to establish a framework for implementation and monitoring these measures. However, it is up to regulatory agencies, project proponents and their consulting teams to ensure that this is done in an appropriate and effective manner. Doing so will assist greatly in reconciling our collective interests in project-based development of lands and resources in British Columbia.