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August 1, 2018

By Email

Nathan Braun
Executive Project Director, Oil & Gas Sector
Environmental Assessment Office
Nathan.Braun@gov.bc.ca

RE: EA Revitalization

Dear Mr. Braun:

The Gitga'at First Nation (Gitga'at) welcomes the opportunity to participate in the Environmental Assessment (EA) revitalization process. As you aware, Gitga'at has participated in a number of provincial EAs, and has first-hand experience with the shortcomings of the current process. To address many of these issues, Gitga'at provides an initial response to EA revitalization in the enclosed submission.

Specific to the Discussion Paper, many interesting ideas are presented but details are lacking. Therefore, we request direct engagement with the Province, including the opportunity to review and provide comment on the draft Intentions Paper. Following, we request a bilateral meeting with the Province prior to the public release of the Intentions Paper. Select topics of interest include: how EA revitalization complements, promotes and/or parallels larger provincial reconciliation actions; changes to Section 11 Orders and the process for strength of claim assessments; alternate models for capacity funding; and dispute resolution (Gitga'at has working experience in utilizing a dispute resolution framework with the Province through the Coastal First Nations Reconciliation Protocol).

We also understand that the Province is currently working on (or will soon initiate) revitalizing a number of other natural resource management regulations and policies, including professional reliance, land use planning, endangered species, and climate-action. Gitga'at has major concerns with all of these topics, and would like to work with the Province on improvement; however, our capacity to do so is strained due to the narrow and overlapping timelines of engagement (including with the EA revitalization process). This further supports our request for direct engagement with the Province moving forward.

We look forward to these proposed engagements, and working the Province to improve the EA process for the benefit of all communities.

Sincerely,



Janine Pittman
Environmental Assessment Coordinator, Gitga'at Oceans and Lands Department, Gitga'at First Nation

cc: Gitga'at Leadership Council;
Chris Picard, Acting Director, Gitga'at Oceans and Lands Department, Gitga'at First Nation;
Dan Cardinal, Senior Advisor, Gitga'at First Nation;
Paul Paterson, Rights and Title Advisor, Gitga'at First Nation; and CEO, Gitga'at Development Corporation; and
Ricardo Toledo, Acting Executive Director, First Nations Relations, Environmental Assessment Office.

Enclosed: *Gitga'at First Nation Submission on EA Revitalization, August 1, 2018*

Gitga’at First Nation Submission on EA Revitalization

August 1, 2018

Introduction

The Gitga’at First Nation (Gitga’at) has never surrendered its title and other aboriginal rights and responsibilities in regard to their governance and authority over resource use and other activities within its territory. The Gitga’at exercise their authority to use their own legal system to assess projects that may impact their territory. The Gitga’at approach first and foremost is aimed at determining how proposed projects would affect their interests, including, but not limited to their rights including title, governance over their territories, culturally suitable economic pursuits, and their core value of sustaining the community’s relationship with the land and waters for the wellbeing of the community.

The Gitga’at has participated in numerous provincial environmental assessment (EA) processes, and have experienced the shortcomings of these assessments first-hand. Over the years, the Gitga’at have developed a deep understanding of the provincial assessment process, and in particular, how these assessments impact them. The comments in this submission flow from direct experience with the inadequacies of provincial EAs.

Gitga’at First Nation Governance Authority and Responsibility

The Gitga’at asserts governance, title, and other aboriginal rights, across the lands and waters in Gitga’at territory (including rights areas).

A defining feature of the Gitga’at is that though they elect a Band Council under the Indian Act, for many important matters such as territorial stewardship they still rely on traditional governance. Their traditional government is comprised of Waaps (house groups), Pte’ex (clans), clan elders and clan Sm’oogyit (Traditional Chiefs), guided by their Gatgyet (strength of their people) and their Ayaawx and Adaawx (traditional laws and customs).

By virtue of its governance, title, and other aboriginal rights, as well as its international human rights as Indigenous peoples, the Gitga’at and more particularly its political institutions, foremost its Traditional Chiefs, have responsibility for the protection of the environment within Gitga’at territory. The exercise of their authority and responsibility is governed by the “Ayaawx” or the “Law of the People” and the “Way We Govern Ourselves”. Decisions affecting Gitga’at lands and resources are made by the Traditional Chiefs and elders following traditional community consultation processes.

The Gitga’at aboriginal right of governance includes the right to continue to govern themselves and their territory through their Waap (House system), Traditional Chiefs, and Ayaawx. Gitga’at aboriginal title encompasses (1) the right to the exclusive use and occupation of the land and waters held pursuant to title,¹ (2) the right to decide how the land, waters, and resources will be

¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 117 [*Delgamuukw*].

used,² and (3) the right to exploit the economic potential of the land, waters, and resources,³ in order to restore, maintain, and transmit to future generations their unique, living relationship with the land and waters.⁴

Other Gitga’at aboriginal rights include the rights (1) to harvest salmon, halibut, seaweed and other marine resources, (2) to access, use and/or safeguard sacred and spiritual places, including on waters, and things, including certain marine species, and (3) to access and maintain use of traditional marine routes for harvesting, trade or other social purposes.

Absent Gitga’at agreement to a project, a decision to approve a project would infringe Gitga’at’s right and title to govern, regulate, and manage their territorial land and waters, in accordance with their Ayaawx, Waap, and Traditional Chief system. Their right of governance includes a right to assess the projects themselves and accept or reject it as they see fit. Absent Gitga’at consent, a Provincial decision, including the regulatory decision making process underpinning it, would infringe the Gitga’at right of governance and aboriginal title.

Decoupling Consultation from Environmental Assessments

The provincial government routinely relies on the EA process, including project proponents’ participation therein, to fulfill its duty to consult and accommodate Indigenous peoples. The legal basis for this is found in both legislation, including policy, and the common law.

Although the courts speak only of the delegation of procedural aspects of consultation to proponents, the reality is that the provincial government often requires proponents, in connection with its EA, to work substantively to address Aboriginal concerns, accommodate Aboriginal interests and even to seek agreement. Thus, the proponent effectively becomes a surrogate for the provincial government in consulting and accommodating Indigenous peoples, without taking on the provincial government’s honour-directed legal obligations. Thus too, Indigenous peoples are pressed to deal with the government’s surrogate whether they have a good relationship with the proponent or not.

It is no exaggeration to say, then that EA is, where it is called for, the provincial government’s main consultation vehicle. Hence, the provincial government often emphasizes to Indigenous groups that it will rely on the EA process and the efforts of proponents to the extent possible to fulfill its duty to consult them. The provincial government’s stated ideal is that once the EA has concluded, it will have nothing or next to nothing left to consult about or accommodate. Its duty satisfied, it can then proceed to decide whether to approve the project.

There are a few things the Gitga’at would like to note in regard to the preceding. First, through its reliance on an EA as its main consultation vehicle, the provincial government is allowed to satisfy its duty to consult and accommodate without having to deal directly with Aboriginal rights. Despite the fact that Gitga’at and other Indigenous groups are “encouraged” to present

² *Ibid.* at 166.& 168.

³ *Ibid.* at 166 & 169.

⁴ *Ibid.* at 126-127.

their rights claims and evidence in support of their existence to those responsible for the EA, at considerable effort and expense, the provincial government's recognition of their rights does not advance. Thus, the provincial government is allowed, no matter the cogency of the evidence presented, to postpone the constitutional promise of the recognition of their affected rights into the indefinite future.

The provincial government is able to avoid dealing directly with Aboriginal rights and still claim that it can satisfy its duty to consult about and accommodate these rights due to the fact that as the process is conceived, and as those charged with doing the assessment are made to understand, adverse environmental effects and mitigation of those effects serve as proxies for adverse effects on and accommodation of rights. From the perspective of Gitga'at and many other Indigenous groups, this is at best pretence and at worst the denial of their constitutional rights through their reduction to environmental considerations. Thus, to the extent that an EA process results in the accommodation of Aboriginal rights, it is largely a collateral effect of environmental effects mitigation measures, including conditions attached to a project's approval.

Finally, by making the EA its primary consultation vehicle, the provincial government avoids the effort it would have to make to obtain Indigenous consent to the proposed project prior to deciding whether to approve it. The process is not designed to elicit Indigenous consent. This is not to say that the provincial government sees Indigenous consent as legally unimportant. (It is because of its legal significance that proponents are encouraged to try to reach agreements with the affected Indigenous peoples.) What it is to say is that the provincial government is not interested in stepping outside its self-serving process to try to obtain Indigenous peoples' consent, excusing itself from the effort by incanting, irrelevantly, that they do not have a veto. It is thus the provincial government's practice to bypass the effort to find consensus and move directly to impose its will on Indigenous peoples. Not surprisingly, Gitga'at and many other Indigenous groups find this approach to EA and consultation frustrating.

Article 32.2 of the United Declaration on the Rights of Indigenous Peoples (UNDRIP) suggests a path forward that respects Indigenous rights and decision-making and removes the disrepute among Indigenous peoples that the provincial government's approach has brought EA processes into:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The Gitga'at submits that by decoupling consultation from EAs and repurposing it along the lines suggested by Article 32.2, the provincial government would restore EA to its core purpose, demonstrate respect for Indigenous decision-making, and open the door to the real possibility of arriving at decisions built on provincial-Indigenous consensus (i.e. genuine reconciliation).

Two Nations and Co-Governance

The Gitga'at has its own decision-making process grounded in its traditional law that has existed since time immemorial. The Gitga'at continue to make decisions using their traditional governance system. It is time for the provincial government to recognize the governance authority of the Gitga'at, and work with Gitga'at as two nations moving forward together. This provincial EA revitalization presents an opportunity to establish collaborative arrangements that would include Gitga'at and British Columbia (BC) mutually respecting and recognizing authority to make project decisions in the best interests of their respective constituents. It would also reflect the relevant articles of UNDRIP, including the requirement for obtaining the free, prior, and informed consent of the Gitga'at before approving any project that may impact Gitga'at rights.

Currently the Gitga'at are pulled into a provincial-dominated process that is flawed, and has never fully represented their voice. The Gitga'at seek a process in which it may engage in government-to-government relations that do not impose on or undermine Gitga'at's voice. The current process does not represent Gitga'at decision-making, at most it has given the Gitga'at the ability to make recommendations to which they have no control of the weight and respect they are given. The process continues to be one sided, and is designed to represent one party's desired outcome. This is opposite of what reconciliation and government-to-government relations should look like.

In order to engage in government-to-government relations that do not impose on or undermine Gitga'at's voice, there needs to be a space for Gitga'at decision-making. This space would respect the traditional Gitga'at decision-making process constitutionally protected as aboriginal rights and title. Currently, the Gitga'at do not see meaningful consultation, discussion, deliberation, or proper decision-making. All of the aforementioned processes happen in a space excluding much of what Gitga'at values.

There are many models for co-governance currently practiced in Canada and internationally. The issue of co-governance should be the subject of a more intensive engagement process on government-to-government level. At a minimum, co-governance requires the decisions of the Gitga'at to have legal significance. Figure 1 displays a model where BC and the Gitga'at undertake parallel assessment processes. This co-governance allows the space for goals, outcomes, and decisions to be met on a "middle ground" where the Gitga'at are given the opportunity to deliberate, decide and even consent.

Please note that on this model, the middle ground for deliberation could include Gitga'at participation in a provincial EA and thus one of the key points where Gitga'at can inform the provincial decision making process. Likewise, Gitga'at can bring information from the provincial EA into its own process and deliberations. With provincial encouragement and ideally legal obligation, proponents would participate in the Gitga'at process. The middle ground for agreement would call on Gitga'at and the provincial government to make good faith efforts to work out their differences and reach agreement through bilateral discussion.

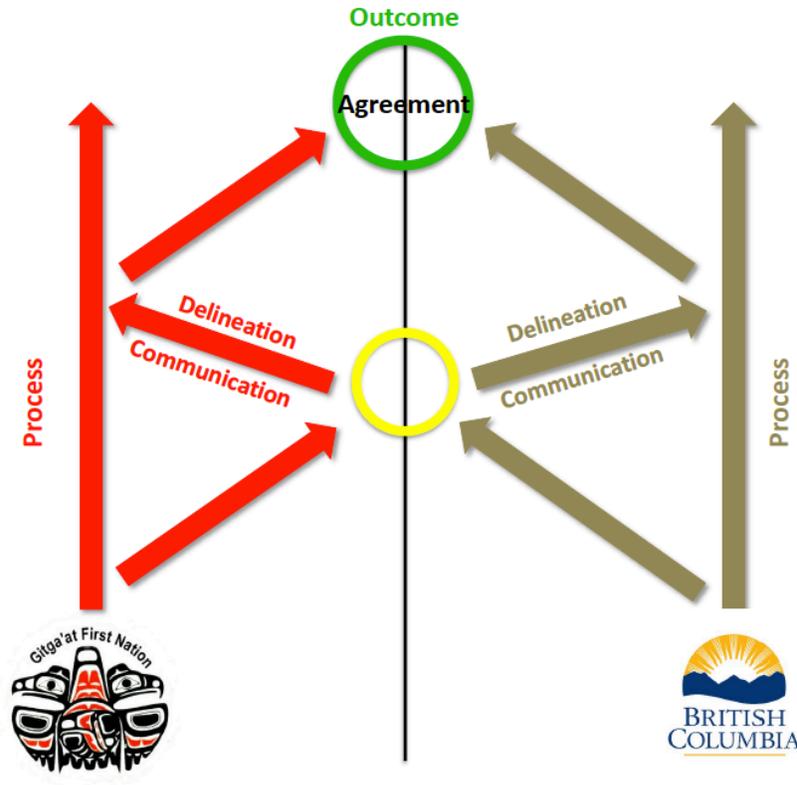


Figure 1: Co-Governance Structure

Differences in Sustainability Priorities and Moving Forward

The Gitga'at and the provincial government has differing conceptions of sustainability based on differing priorities relating to the environment and economic development. The Gitga'at are concerned foremost with sustaining their relationship with the land, waters, and living beings and thus their unique way of life within their territory. The provincial government is concerned primarily with achieving sustainable development. These differing priorities are partly the function of and reflected in different traditions, values and laws. They are also partly a reflection of the fact that to the Gitga'at people, their territory is their ancestral home, their only home; it is not merely one of many more or less interchangeable locales or areas that make up the Province of BC or Canada, and constitute the overall environment against which the Crown balances economic development. These differing conceptions and priorities provide a further basis for saying that neither Federal nor Provincial responsibility for the environment in regard to economic developments touching upon Gitga'at territory can be said to represent or substitute for Gitga'at responsibility. They provide a further basis for saying also that the Crown is under an increasingly pressing need to advance the reconciliation of the hitherto ignored Gitga'at rights and responsibilities regarding the environment within which they live with the Crown's assertions over the same.

For a revitalized process, Gitga'at provides the following preliminary recommendations:

- As described above, Gitga'at requires the ability and space (including sufficient time and capacity) to conduct their own assessment of all proposed developments within their Aboriginal rights and title areas, to make their own decisions, and to have the Crown and proponent respect their decisions. In Gitga'at's experience with the current EA process, feedback provided to the Crown, which sometimes involves the recommendation that a project should not receive an EA Certificate (EAC), at most results in additional mitigation measures or monitoring programs rather than rejection or a genuine effort on behalf of the Crown to engage in consultations designed to find mutually acceptable solutions. Ultimately, Gitga'at requires the legal space and respect to make their decision.
- A change in narrative from the Crown is required to frame Indigenous governments as decision makers. This also requires a shift in "consultation" to "co-governance".
- In any decision by the Crown, the precautionary principle must be applied, and if trade-offs are required among the environment and social or economic objectives of the Crown, Indigenous groups must be engaged in the process to clearly define trade-off rules (e.g., through conditions).
- Given that climate change disproportionately affects coastal communities, Gitga'at suggests that climate change impacts be assessed throughout the entire EA process with an adaptive management approach, and measured against Provincial and Federal commitments.
- UNDRIP incorporated into the body of legislation for the new act, not just the purpose section.
- In regions where multiple proposed projects and approved projects occur, a comprehensive capacity funding process should be implemented by the province in addition to project-specific grants.
- At the onset of a project (i.e., prior to development of the Project Description) and throughout the life of a project, proponents must be legally required to provide capacity support to Indigenous groups. Since every Indigenous group has unique capacity requirements, each Indigenous group must have the ability to negotiate capacity agreements with proponents directly.
- The foundation of the provincial five pillars should be more comprehensive and flexible to incorporate the value "pillars" of Indigenous groups. Identifying and defining Valued Components and indicators that reflect the values of Indigenous groups is fundamental.
- The development and adoption of health impact assessment standards for Indigenous people is critical in the development of a revitalized EA process.
- The EA process must work to identify ways to characterize impacts based on Indigenous thresholds alongside those applied by the province rather than simply summarizing views of Indigenous groups.
- Multi-agency coordination and engagement (including with Indigenous groups) must occur prior to any investigative authorizations, e.g., Lands Act tenures. Some places are simply not conducive to development. This multi-agency coordination and engagement should continue throughout the life of a project.
- Engage with Indigenous groups early in project development (i.e., prior to planning and development of the Project Description) to properly scope the EA, including the Cumulative Effects Assessments (CEA). All CEA must be conducted with an adaptive

management approach, including evaluating Indigenous values, defining appropriate spatial and temporal boundaries depending on Indigenous values, and development of significance impact thresholds from an Indigenous perspective.

- Collaboration is required to guide the level of information that is absolutely required for an EA process, for both the provincial and Gitga'at assessment, including critical components such as: front end engineering and design, economic feasibility, modelling and associated sensitivity analysis, and baseline data collection planning.
- Policy is needed on managing inaccurate information in EAs for the public record.
- Independent assessment of potential project benefits is needed to confirm a proponent's assessment.
- EAC conditions should require comprehensive third-party audits (including involvement of community monitors) to monitor and publicly report effectiveness of mitigations and adaptively manage effects.
- Establish a robust compliance and enforcement regime that involves the coordination of all authorities, including all provincial agencies and Indigenous governments.
- Develop a legislative process that requires proponents to engage in regional long-term cumulative effects monitoring and management over the life of projects and beyond (i.e., monitoring and management does not stop at the completion of decommissioning).
- Develop a dispute resolution framework for the EA process, where each nation (including Indigenous and non-Indigenous) has an equal voice.
- Regional-level strategic-environmental assessment (SEA) is required for a more informed decision rather than relying solely on project-level assessments. SEA can limit potential bias and allow for a broader-scoped assessment by including all decision-making jurisdictions in a region, including Indigenous governments. Enforceable requirements for conducting SEA are needed for all parties with assessment and jurisdictional responsibilities, and SEA must include Indigenous values and perspectives.

This written submission is one of the many engagements required from the provincial government on the development of a revitalized process, and Gitga'at looks forward to future engagements.