



GITANYOW HEREDITARY CHIEFS

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**Memo to BC Environmental Assessment Revitalization Team
Fern Stockman, Ricardo Toledo, Assistant Deputy Minister Scott Bailey**

RE: EAO DISCUSSION PAPER & GITANYOW WILP SUSTAINABILITY ASSESSMENT PROCESS

From: Gitanyow Hereditary Chiefs Office, Wilp Sustainability Director Tara Marsden

August 7, 2018

Background

In March 2018, the provincial government initiated a revitalization of British Columbia's environmental assessment (EA) process. The Gitanyow Hereditary Chiefs are one of the many First Nations who have called for reform of both the federal and provincial EA processes for many years. While the timelines for the revitalization process are quite restrictive and not necessarily conducive to meaningful engagement, it is encouraging that the new coalition government sees the need for change.

Gitanyow was one of the first nations to bring the EAO and the EA process into our government-to-government agreement (Gitanyow Huwilp Recognition and Reconciliation Agreement, 2016). In the new Schedule H, our two governments make commitments to engage meaningfully on EAs, to acknowledge and uphold the Gitanyow Lax'yip Land Use Plan, and to "negotiate and attempt to reach agreement on a framework, principles and approach for project-specific Wilp sustainability assessments." (page H-3)

Gitanyow is seeking to maximize the opportunity presented in the EA Revitalization to develop further our own Wilp Sustainability Assessment process.

Progress to Date

- In April 2018, the representatives from the BC Environmental Assessment Office met with the Gitanyow Hereditary Chiefs and their staff, the attached powerpoint presentation was given by the Chiefs Office. There was representation from all of the Gitanyow Wilp at the meeting.
- A follow up meeting was held with Assistant Deputy Minister Scott Bailey, Gitanyow Hereditary Chiefs President Glen Williams and Gitanyow Wilp Sustainability Director Tara Marsden in May 2018. Gitanyow tabled a budget for developing the Wilp

Sustainability Assessment process. A portion of this budget was subsequently covered by a contribution from the EAO.

- A final meeting was held in late July 2018, again with healthy representation from Gitanyow Chiefs. The EA Discussion Paper was presented and discussed, and an outline of the Gitanyow Wilp Sustainability Assessment Process was presented. An invitation was extended to Gitanyow to participate in an October meeting of all BC First Nations and the EAO and other representatives of the provincial government to review the Intentions Paper, which will more clearly indicate proposed legislative changes to the EA Act.

Areas of Possible Agreement

As Gitanyow biologists and technicians are currently quite busy in their field season, more time to review the Discussion Paper would be ideal. However, upon a cursory review of the Discussion Paper and hearing the clear commitments from BC EAO staff at the most recent meeting, we are cautiously optimistic about progress in the following key areas:

Recognition of Indigenous Processes: The Discussion Paper and Environmental Assessment Process Conceptual Model refers to Indigenous nations conducting their own assessments and providing their decisions prior to a Minister making a decision. EAO staff clearly stated at our most recent meeting that the proposed legislation would ensure that the Minister must consider the Indigenous decision in his/her final decision, and if the Minister does not make a similar or same decision must provide a detailed reasons for decision with specific criteria.

Because of the limited timelines for the EA Revitalization process, Gitanyow sought very early on to secure a commitment from BC that new legislation would recognize and set parameters for reconciling provincial EAs with First Nations assessment processes such as Gitanyow's. By having this commitment in legislation, it would allow for more time for Gitanyow to continue to develop and complete the Gitanyow Wilp Sustainability Assessment Process (WSAP). The building blocks for this process are already in place from experience in past EA's, but need to be formalized and clarified in a policy document. This will take place over the next 6 months.

UNDRIP: BC's reaffirmation of the commitment to the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples, and specifically the implementation of Free, Prior and Informed Consent for major projects affecting Aboriginal rights and title is encouraging and Gitanyow strongly supports this commitment and hopes to see it upheld in any new legislation. The Gitanyow Wilp Sustainability Assessment Process will be a new way to uphold both the Gitanyow Ayookxw and the UNDRIP, while reconciling with revitalized provincial EA processes.

Regional Strategic Assessments: Like many organizations, Gitanyow called for more stringent requirements for regional strategic environmental assessments that would better incorporate other types of development impacts such as forestry, and predict and manage for impacts from climate change. In addition, regional strategic assessments can build on agreed up Land Use

Plans such as the Gitanyow Lax'yip Land Use Plan, and construct various scenarios for multiple development projects within one area, or affecting one key species at risk (i.e. salmon in Skeena or Nass Watersheds).

Potential for Northern Office: In our first meeting with the EAO, our Chiefs called for a northern EAO office or regional offices to bridge the gap between Victoria decision-making and the regions which are affected by such decisions. It is encouraging to see a call for Regional Sustainability or Reconciliation Offices to house data and assessments.

Early Engagement & Readiness Gate: It is very promising to see Gitanyow's recommendations for early engagement, planning and a potential 'off-ramp' or 'readiness gate' be included in the Conceptual Model. Gitanyow's examples from past EAs of poor site location, clear inconsistencies with the Gitanyow Lax'yip Land Use Plan, and deprivation of Gitanyow Wilp of their right to the inescapable economic component of Aboriginal title, are clear indicators of a need for Early Engagement and a Readiness Gate. While a time-bound alternative dispute resolution process is one way to alleviate disagreements on whether a project should be allowed to continue to review or not, a more transparent process might be to develop clear criteria to assess this during the legislation development underway now. Gitanyow provided possible Sustainability Criteria as a starting point, and while there were mentions of potential decision-making criteria, these should be applied in early engagement and readiness assessment, and clearly communicated to proponents to avoid wasted time and resources of proponents, First Nations and government.

Areas Still Needing Work

Recognition of Aboriginal Title: The Conceptual Model includes a reference to "Indigenous nations reach[ing] understanding on shared territories with the assistance of a timebound alternative dispute resolution process." As stated at the July meeting, Gitanyow does not acknowledge any 'shared territory' that overlaps the Gitanyow Lax'yip. The Supreme Court of Canada has identified a 3-part test for Aboriginal title, and there is good degree of consensus between the provincial government and Gitanyow on the strength of case of Gitanyow's evidence to meet this test. (SOC assessments have been completed for large portions of the Gitanyow Lax'yip in relation to EAs on: the Northwest Transmission Line; PRGT and WCGT pipelines; Kinskuch WindRiver Project; Avanti Kitsault Mine Transportation Corridor).

Where our neighbours have chosen to recently expand their boundaries without providing any such similar evidence, and only to further their economic agendas, Gitanyow's Lax'yip boundaries have remained consistent since contact. In addition to economic motives of our neighbours, government policy/mandates in treaty negotiations and changes in the Consultative Areas Database being linked to Skiikm Lax Ha support for a mining project, have all had significant impact on Gitanyow rights and title. To help build certainty and transparency for government and proponents, adhering to the Supreme Court of Canada test for title, and verifying strength of case evidence with First Nations is required for all EAs.

Methods for Assessment of Economic Component of Aboriginal Title in Project Development & Accommodation

The Conceptual Model refers to “government establish[ing] revenue sharing frameworks with Indigenous nations where applicable.” These frameworks need to be directly linked to the strength of case evidence and consensus on title recognition identified above. True revenue sharing must acknowledge the proper rights and title holders of the territory, and be linked to strength of case assessments. A one size fits all approach to revenue or benefit sharing actually deprives and robs Gitanyow of true revenue sharing when revenues or benefits are ‘pro-rated’ for overlap.

Further, where proponents are conducting early engagement, government must proactively inform and advise companies of the proper rights and title holders to prevent proponents from entering into agreements with First Nations who have may have made dubious or exaggerated claims to economic fruits of the land in question. Gitanyow has provided concrete examples of error on behalf of both proponents and government in mistakenly providing benefits and revenues to neighbouring nations who do not have any prima facie evidence for Aboriginal title in the Gitanyow Lax’yip. The Supreme Court of Canada has been clear that Aboriginal title has an inescapable economic component, and this must be followed in the determination of any economic or other accommodation granted or supported by the provincial government.

Lobbying Registry & Political Interference: In the attached powerpoint and in follow up meetings, Gitanyow requested that the EAO establish a lobbyist registry for each EA. This registry would document transparently the number of times any representative of government were lobbied by the proponent on a given EA-reviewable project. During the EA reviews for the two proposed LNG pipelines through Gitanyow territory, it was clear that the approval of all LNG pipelines was a foregone conclusion, given the political platform of the former government.

Ministers political interference in the independent EAO review of projects significantly undermined the meaningfulness and effectiveness of the reviews. To hold decision makers and bureaucrats accountable, lobbying by proponents while the EA is underway must be documented and publicly available.

Legislation Drafting

Link to Mikisew Court Case Ruling: Gitanyow is currently an intervenor in the Supreme Court Case brought by the Mikisew¹ that seeks to resolve the question of the Crown’s duty to consult on legislation that has the potential to affect Aboriginal rights and title. Should this decision come down during the legislative drafting stage, which is possible given anticipated timelines

¹ SCC 37441 Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation v. Governor General in Council, et al.

for both, BC should plan to engage more fully during the legislative drafting stage to ensure that what was heard during initial engagement is enshrined in final legislation.

Next Steps

1. As discussed, Gitanyow aims to complete the Wilp Sustainability Assessment Process within 6 months. Engagement with BC is welcome throughout to ensure more seamless reconciliation of the new EA Act with Gitanyow's process.
2. Gitanyow continues to seek confirmation and commitment from BC that new legislation will recognize and respect Indigenous environmental assessments, such as Gitanyow's, and seek to reconcile them with the new EA Act.
3. Gitanyow will endeavour to participate in the October meeting with all BC First Nations, specifically to learn more from the Ajax Mine and Woodfibre LNG assessments conducted by First Nations, as well as to engage on the Intentions Paper planned by BC.
4. BC has requested information on Gitanyow's Fee Schedule specifically in the Wilp Sustainability Assessment process, to better inform increases in capacity funds under the new Act. Gitanyow has agreed to provide this, based on past EAs and actual costs.
5. In accordance with Schedule H of the Gitanyow RRA, if Gitanyow is unable to attend the October meeting, one further direct engagement meeting with Gitanyow and BCEAO may be required prior to the final legislation being complete.