

Environmental Assessment Revitalization Engagement

Tsay Keh Dene

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Participants:

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Final Summary Notes

Fern Stockman presented an overview of environmental assessment (EA) revitalization and provided handout of presentation to TKD. The following represents what the EAO heard from TKD during the discussion.

Implementation of UNDRIP:

- These changes to the EA process and commitment to implement UNDRIP is meaningful if there is a genuine commitment to implement UNDRIP.
- Discussion paper needs to clearly identify the implications of UNDRIP. Can't just commit to implement. Need to clearly speak to:
 - 1) Right to land territory and resources (Article 26) within framework for engagement with First Nations in EAs (i.e. can't just apply law around aboriginal title)
 - 2) Free Prior and Informed Consent (FPIC)– need to clearly define how you interpret this and consider its implications

Strength of Claim (SOC) Model:

- The present approach to SOC is adversarial and is a recipe for conflict. If you replicate the current consultation model in a new process, then other efforts to establish process that is meaningful and respectful will be undermined.
- For the EA of the Kemess Underground Project (Kemess) there was some disagreement around title. Rather than dwell on the differences, we focused on the areas of agreement.
- The test for aboriginal title in Canada is sufficiently regular and exclusive occupancy in 1846. This concept of sufficiently regular has been abused, is problematic and a recipe for conflict in situations of disagreement.
 - If you look at Article 26 of UNDRIP, this concept of sufficiently regular is foreign.
- In designing a new process, if the focus becomes a legalistic and technical interpretation of case law, major problems will remain and you will struggle to implement the TRC calls to action.
- I foresee major problems if First Nations self-select their level of engagement in EAs. TKD views themselves as stewards of the land. Other First Nations involvement in an EA diminishes the claim to title; and the possibility of litigation becomes high.
- If a project is in an area of overlapping claims, you could say to First Nations, you need to reach agreement amongst yourself about the process and level of engagement that will apply collectively, and failing that agreement, the EAO will reach its own conclusions.

- The cases where First Nations are successful on resolving boundaries will be rare.
- But where they can be successful is determining level of engagement, type of assessment, etc.
- EAO retaining ability to make decision on level of First Nation engagement in EA is a strong incentive and promotes compromise.
- There is a lack of trust amongst First Nations that the province will conduct a fair assessment of SOC. The perception is the province reaches conclusions that are designed to get the permit out the door (i.e. instrumental approach to SOC; the Province is not an honest broker).
- New process should be designed to dispel the current perceptions of First Nations.
- SOC shouldn't be the central focus of engagement but recognize we can't avoid SOC all together.
- SOC is a lever to achieve quality engagement (particularly title SOC in EA). If quality engagement is guaranteed (e.g. genuine commitment by proponent for collaboration, collaboration agreement with the province) and there are other levers then SOC becomes less important.

Role of Proponent:

- For Kemess, we collaborated well with EAO but this was successful because we had a proponent that would support and facilitate that collaboration.
 - The EA conduct agreement (with Proponent) set out in detail a process for collaboration on the EA and was supported by commitments for funding from the proponent including for First Nations to retain independent consultants and meaningfully participate.
- Not optimistic that collaboration can be successful with a hostile proponent.
- Should consider in new process what efforts can be made to ensure there is a commitment by proponents to collaboration to complement the collaboration between EAO and the First Nation(s).

Funding:

- First Nations require the financial means to collaborate, otherwise collaboration is not meaningful.
- Amount of funding from EAO is not very generous.
- In a model with sufficient First Nation funding for EA the question arises: Who pays? Proponents should pay, rather than the tax payer. Should legislate the requirement that proponents will contribute substantially to First Nation capacity in EAs. There may be a role for EAO to facilitate this or contribute, but the majority of capacity funding should come from proponents.

Role of EAO:

- Previously we thought EAO was agent of the proponent. That perception didn't arise in the Kemess EA because there was a commitment to strive for consensus and because EAO was mediating and facilitating and encouraging the proponent to work constructively to address First Nation's concerns. This was important for the success of the collaboration.

- In a new process should develop greater clarity around the role of EAO and its relationship with proponents, First Nations, and others. The role should include a greater focus on mediative and facilitative role.
- We raised a lot of issues that could not be addressed in the EA. In the past when that occurred, EAO said “this isn’t our issue”. In the KUG EA EAO said “these are legitimate concerns” and we compiled a list of issues and these were brought forward for a clear commitment to address them in permitting. So you resolved problems instead of drawing a sharp line. This approach should continue to be used in EAs.

Decision Making/ Dispute Resolution:

- Require mechanism for dispute resolution, particularly in situations of co-administering a process and joint decision making.
- Third party? Arbitration may not be possible due to potential to fetter decision maker
- Scope of dispute resolution should not be confined to Aboriginal rights and title

Role of FNs:

- Role of First Nations should be defined in a certain way. Conflict will be around how to define this role and how is it reflected in legislation.
- Role should include the ability to make meaningful and binding decisions about a project (FPIC).
- There should be a role for First Nations in public engagement. This is an opportunity for First Nations to engage the public on First Nations rights, culture, etc. Part of this larger concept of reconciliation.

Next Steps:

- EAO offered to meet again to provide an overview of and seek input on the conceptual model.
- TKD will likely comment on the discussion paper.