ARE FIRST NATION SHARED DECISION-MAKING AND COLLABORATION AGREEMENTS BEING USED ILLEGALLY?

Posted on August 9, 2022

Categories: Insights, Publications

Introduction

In recent years the province of British Columbia has increasingly focused on reaching "non-treaty agreements" with Indigenous groups. Unlike treaties, they are not enshrined into law by federal or provincial statute. For example when the Nisga'a treaty was signed, the Legislature passed the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2. Section 3 of that Act states:

> **3** (1) The Nisga'a Final Agreement is approved, given effect, declared valid and has the force of law.
>
> (2) Without limiting subsection (1), a person or body has the powers, rights, privileges and benefits conferred on the person or body by the Nisga'a Final Agreement and must perform the duties and is subject to the liabilities imposed on the person or body by the Nisga'a Final Agreement...[1]

By contrast, when the province signs agreements[2] that contain shared decision-making or collaboration provisions there is generally no implementing legislation. They are not law. They do not change the law.[3]

So what do these agreements mean for people or companies that may be affected by them, as in the case for example of applicants for permits under the Mines Act, R.S.B.C. 1996, c. 293, the Forest Act, R.S.B.C. 1996, c. 157 and similar statutes?

The Practical Reality

Applicants are in practice often told (directly or indirectly) by provincial officials that they require approval from both the provincial statutory decision-maker and the First Nation that has one of these agreements. But that is simply wrong in law. Such agreements cannot and do not change the law, and the law is clear that First Nation approval is not required (except in areas of proven Indigenous title, of which only one area exists in BC). Nothing in provincial law requires it. Nothing in the Crown's duty to consult First Nations requires it. In fact, the Supreme Court of Canada has said numerous times that the duty to consult includes a requirement to discuss and potentially accommodate impacts on the exercise of asserted Indigenous rights, but it does not provide a veto.[4]

Where it gets more complicated is where the government does not suggest First Nation approval is formally required, but where officials "strongly encourage" the proponent try and reach consensus with Indigenous groups. The effect of this often seriously complicates or delays decision-making processes. It can also result in serious unfairness to applicants.

Administrative Law Principles and the Duty to Consult

There may be good reasons for the Crown to enter into agreements with First Nations to give practical structure and effect to the duty to consult. Indeed, the courts have encouraged it. But if in the effort to do so government ties its hands into a process that is unduly opaque and lengthy, the result may cross the line into impermissible legal effects on third parties under administrative law principles, which are the cornerstone of our legal system and the Rule of Law.

This is frequently manifest in several ways.

- Government may have private discussions with First Nations about an application or an applicant but not advise the applicant of any information provided or submissions made by the First Nation that are adverse or prejudicial to the applicant (and not allow the applicant a chance to respond). This may, at least in some cases, be a breach of the common law rules of procedural fairness and can provide a basis for the court's intervention.
- Government may impose conditions on an applicant on the basis of First Nation requests that occur during private collaboration or shared decision-making sessions between the First Nation and Government, without affording the applicant an opportunity to know or respond to the underlying reason motivating the conditions. This may, at least in some cases, be a breach of the common law rules of procedural fairness and can provide a basis for the court's intervention.
- Government may make procedural decisions or agree to procedural requests from First Nations under a collaboration or shared decision-making agreement that has the effect of delaying the application process materially, without giving the applicant an opportunity to know and comment on that proposal. This may, at least in some cases, be a breach of the common law rules of procedural fairness and can provide a basis for the court's intervention. It may also constitute a fettering of discretion by rigidly committing the decision-maker to certain courses of action that would otherwise be wholly discretionary under provincial law, and this too can potentially provide a basis for the court's intervention.
- Government may, under one of these agreements, enter into discussions and make commitments to a First Nation related to the exercise of compliance and enforcement powers under provincial law. This again may, at least in some cases, violate principles of procedural fairness (and could also potentially raise Charter of Rights and Freedoms issues in cases where a potential offence at issue comes with a

possibility of imprisonment).

Anti-corruption Issues

One of the more serious concerns that may arise relates to the influence peddling provisions of the *Criminal Code of Canada*. Specifically, it could be an issue in cases where a collaboration agreement or shared-decision making agreement gives a First Nation influence over the timing or outcome of a permitting decision while the same First Nation is, as the same time, seeking financial benefits from the applicant and/or government officials. This concern is exacerbated where officials openly state that getting an agreement with the First Nation will "make it much easier" to get the permit.

The Supreme Court of Canada[5] recently considered the influence peddling provisions of the *Criminal Code* and they were given broad interpretation. Specifically the Court had to consider section 121(1)(d) which says every person commits an offence who:

> **(d)** having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
>
> > **(i)** anything mentioned in subparagraph (a)(iii) or (iv)...

The Court then went on to consider how to interpret the phrase "any matter of business relating to the government" which is used in subparagraph (a)(iii) and said:

> ...any matter of business relating to the government" must be interpreted broadly. A matter of business relates to the government if it depends on government action or could be facilitated by government, given its mandate..."

Further, in other cases[6] courts have made clear that "this provision of the *Criminal Code* does not explicitly require proof of any ulterior mental element".

So what does this mean? This is an issue that should be given serious attention by any company considering paying benefits to a First Nation in relation to securing First Nation support for a project or application, particularly where that First Nation has some form of collaboration or decision-making agreement with the province related to such statutory decision-making.

Put simply, if you cannot legally pay a decision-maker to influence his or her statutory permitting decision, then can you legally pay another party to support the permit issuance in a shared decision-making or collaboration process with the decision-maker?

Similar concerns can potentially arise under foreign anti-corruption legislation such as the US Foreign Corrupt Practices Act of 1977 ([7] and the UK Bribery Act (UK), [8], which can apply to some companies operating in Canada, many of which are particularly risk-averse in light of these laws.

The devil will usually be in the details as it relates to these anti-corruption issues, and each case must be carefully considered on its own facts. But generally speaking, the more the statutory decision maker is involved in, connected to, or aware of such payments, the greater the risk. And provincial officials (especially at the working level) often seem oblivious to this.

Have the Courts Yet Ruled on These Agreements?

To date there has been little direct case law concerning these agreements. In one recent case, a junior mining company objected to delay in the issuance of an exploration permit under the *Mines Act* in circumstances where the government was engaged in a shared decision-making process with the Tsilhqot'in National Government. It filed a judicial review petition[9] seeking the following:

> Part 1: ORDERS SOUGHT
>
> Declarations that:
>
> (a) the Strategic Engagement Agreement (the "Agreement'), entered into between the Province of British Columbia (the "Province"), the Tsilhqot'in Nation and the T'silhqot'in National Government (the "TNG") does not:
>
> (i) modify the Crown's duty to consult under section 35 of the Constitution Act, 1982; or
>
> (ii) displace common law principles of administrative law, including procedural fairness, that apply to statutory decision-makers acting under provincial legislation.
>
> (b) the Respondents have violated the administrative law rights of the Petitioner by taking actions and making decisions under the Agreement that affect the Petitioner's rights and interests (including delays in rendering a decision) without providing the Petitioner a prior opportunity to make submissions in respect of those steps and decisions.

However, in that case the permit delay was finally resolved and the permit issued after the petition was filed and before the Court hearing, so no court decision was ultimately rendered.

Where From Here?

Advancing reconciliation and building strong relationships with Indigenous groups is a shared goal, but true reconciliation is not achieved in cases where there is a singular focus only on the Crown's efforts to build

relationships with Indigenous groups and other legal rights get disregarded. *All* relevant legal rules must be considered and respected for reconciliation to be achieved in any real sense of the word.

Unfortunately, unless and until these matters are litigated, or the Legislature debates and passes implementing legislation for these agreements (like it does for treaties), questions and concerns are bound to arise. Any applicants dealing with such issues may wish to seek timely legal counsel to ensure their interests are duly respected and their anti-corruption risks duly considered, in a manner that is also mindful of the related goals of reconciliation and fostering strong relations with Indigenous groups.

[1] Similar legislation exists for the other modern day treaties in BC, i.e., *Tsawwassen First Nation Final Agreement Act*, S.B.C. 2007, c. 39; *Maa-Nulth First Nations Final Agreement Act*, S.B.C. 2007, c. 43; Tla'amin Final Agreement Act, S.B.C. 2013, c. 2.; *Yale First Nation Final Agreement Act*, S.C. 2013, c. 25;
[2] Such as the Tsilhqot'in Stewardship Agreement or one of many other such agreements with these kinds of provisions.
[3] Shared decision-making concepts have been included in provincial law to some limited extent under the *Environmental Assessment Act*, S.B.C .2018 c. 51, and section 7 of the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019 c. 44, but these are the exception and there is no legislation implementing shared decision-making or collaboration agreements generally.
[4] See *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 and related case law.
[5] *R. v. Carson*, 2018 SCC 12
[6] *R. v. Abdulle*, 2015 ONSC 7023
[7] Pub. L. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. §§78dd-1, et seq.
[8] 2010, c. 23
[9] *Carlyle Commodities Corp. v. British Columbia*. A copy of the petition is available here. It should be acknowledged that the authors were counsel to the company in that case.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.