

**SLIDE 1: Welcome**

**First Nations and Offshore Resource Projects: Overview of Key  
Issues**

Tony Fogarassy, M.Sc., LL.M.

Chair, Energy Law Group, Clark Wilson LLP

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*Thank you* to the peoples of the Coast Salish First Nations upon whose traditional lands we are gathered upon today.

The Coast Salish have resided in this region since time immemorial.

*Thank you* to the organizers of this year's Pacific Canada Oil & Gas Development Forum for the invitation to speak today.

And *thank you* for your attendance here today.

## **SLIDE 2: Introduction**

The pathway to hydrocarbon exploration and development on Canada's Pacific margin is perhaps viewed as **enigmatic** to those who do not regularly conduct business in British Columbia. While the range of risk factors for launching an offshore resources project is reasonably well known, the **quantification** of those factors is not.

The mix of environment, jurisdiction and ownership of resources in the offshore, and the views of local Aboriginal and non-Aboriginal communities, has stymied an implementation of a coherent approach by the federal and British Columbia governments to encourage the exploration and development of offshore oil and gas for more than 30 years.

In 2003, the federal government decided to limit any discussion about lifting the **federal** moratorium on offshore oil and gas exploration **to** the north coast region and the Queen Charlotte Basin; thus excluding the southerly Georgia, Tofino and Winona basins. While this simplified discussion, the issues remain the same.

I will speak on the principle, "big picture", issues arising from an offshore hydrocarbon project with an emphasis on the role, and impact of First Nations.

In many ways assessing a project's impact on the environment is also an assessment of the ecological and cultural values of the local First Nations who may be impacted.

With many decisions by the Supreme Court of Canada fleshing out the scope and extent of Aboriginal rights, and appellate and trial courts in Canada's 13 provinces and territories doing the same, governments must now assess the impact of First Nations' assertion of **Aboriginal title** where offshore projects are located. As we all know, governments are the primary grantors of oil and gas rights and the accompanying suite of operational authorizations.

Many government decisions which may interfere with Aboriginal rights, including Aboriginal title, may be legally **justified, if** certain common law requirements are met, including most importantly - the discharge of duties of consultation and accommodation. An entire body of law has developed over the last 15 years around the so called "duty to consult".

What makes the risk assessment of factors involving the Pacific offshore more difficult is the **overlap** of issues of the (1) environment, (2) ownership and jurisdiction; as well as (3) duties of consultation and accommodation. It is impossible to place each issue into a compartment and to address matters as they arise. A more encompassing, almost holistic approach is required.

To the credit of the British Columbia government and First Nations leaders, a generic pathway to resource development appears to be in the process of being developed **that may** potentially be applied to the BC offshore.

My presentation will be divided into the topics as seen on this slide; the environment, ownership and jurisdiction, duties of consultation and accommodation, government policy and I will conclude with one or two pointers.

### **SLIDE 3: Setting the Scene**

Canada has more than 600 Indian Bands – that is discrete First Nations with their own statutory or hereditary chiefs and band councils. About 200 bands are in British Columbia. Of the 53 indigenous languages in Canada, 32 are from British Columbia and, sadly, 5 are now effectively extinct.

The vast majority of those bands, including almost all along the coast, have NOT entered into treaties with BC and federal governments. That is, for the most part, these First Nations have NOT ceded nor surrendered their Aboriginal rights or title in their traditional territories. This includes First Nations whose territories encompass the entire Queen Charlotte Basin.

Court cases have empowered First Nations. The judicial pendulum really has swung in their favour the last 15 years. While First Nations generally do not have a legal veto, they certainly have a *de facto* veto, in that well placed litigation and injunctions may delay projects such that they can be delayed or ultimately forced to be abandoned.

The struggle and historical marginalization of First Nations is evident to everyone. While media reports state time and again that BC First Nations are opposed to offshore oil and gas development, the fact is

the majority of coastal First Nations are quite open minded and have not made any concrete decisions one way or the other.

First Nations are very keen to learn more about the offshore industry – both its impacts and its opportunities. **And** to play an integral role in that industry, **if** it moves forward. First Nations have said, with ample justification, that they were shut out of, and received little benefit from, 150 years of timber harvesting and coastal fisheries by non-Aboriginal interests. If offshore resources are to be exploited, then First Nations **WILL** position themselves to share directly in the exploitation.

Thus the role of First Nations in offshore development will be enormous, both in erecting and maintaining a regulatory regime **and** in sharing in the benefits.

So this brings us to where one would expect First Nations to play a direct role in the offshore. As a lawyer I can only speak to what are purely legal issues, however on financial and policy related issues, I'm sure you will hear speakers at the conference detail their perspectives.

While the key issues overlap, is one issue a “driver” or a “decider”? Well, ultimately it is government policy, both federal and provincial, that will be the “driver and decider”; **specifically** policy regarding First Nations.

Really, no single issue is determinative. That said, let me provide some thoughts on environment, jurisdiction and ownership of resources and specific legal duties owed to First Nations in the next few minutes.

#### **SLIDE 4: Environment**

Bearing in mind, the **purpose** of my talk is to tease out and highlight some of the legal references to First Nations with regard to the offshore, let me start with the two obvious pieces of environmental legislation – the Canadian Environmental Assessment Act, or “*CEAA*”, and the BC Environmental Assessment Act, or “*BCEAA*” and provide a review of the *Species at Risk Act* and the *Oceans Act* in terms of their provisions regarding First Nations.

## **SLIDE 5: Environmental Assessment Legislation**

- *CEAA*

The *Canadian Environmental Assessment Act* has a stated purpose in its preamble of the promotion of “communication and cooperation between responsible authorities (that is, the Crown) and Aboriginal peoples with respect to environmental assessment”.

While *CEAA* is permissive, in that it does not mandate the Crown to involve First Nations, the fact is First Nations are routinely involved. *CEAA* provides for statutory discretion for the Crown to consider “traditional Aboriginal knowledge”, also known by the acronym “ATK”.

The *CEAA* definition of the phrase “environmental affect” casts a broad net whereby First Nations and their interests and traditional values form an integral part of an environmental assessment. Values involving health and socio-economic conditions, physical and cultural heritage and historical and archaeological structures, sites or objects are all considered in an EA.

Assessment of cumulative environmental effects is an emerging area. The combined effect of present and future projects, related and unrelated, may be viewed by Environment Canada as requiring detailed analysis and assessment.

First Nations often oppose projects based on grounds that the project will have a negative cumulative impact.

- *BCEAA*

In contrast the BC *Environmental Assessment Act* makes no express reference to First Nations. However, as with *CEAA*, proponents and the Crown routinely consult with potentially affected First Nations. Indeed, *BCEAA* makes no mention of a requirement whereby proponents must carry out an assessment on cumulative environmental impacts. However, where a project requires an assessment under *CEAA*, then a cumulative impacts study will be undertaken – however, if the project is solely under provincial jurisdiction, AND it meets the threshold as a “reviewable” project, then arguably cumulative impacts do not have to be assessed.

While the BC legislation is silent on First Nations, the BC Environmental Assessment Office does flag the need to ensure First Nations are consulted, as required. The BC government’s own 2002 consultation policy provides a good starting point for assessing First Nations interests in a project.

## **SLIDE 6: “Other” Environmental Legislation**

Of course, EA-specific legislation is complemented by an abundance of “other” environmental legislation. I have set out many of these pieces of legislation in Footnote number 9, of my paper. The two major pieces of legislation which afford First Nations an express and crucial role are the *Species at Risk Act* and the *Oceans Act*.

The *Species at Risk Act*, also called “SARA”, is Canada’s **endangered species** legislation. First Nations are referenced in the legislation, principally in an advisory capacity role whereby SARA established the National Aboriginal Council on Species at Risk. This Council ultimately advises and informs The Committee on the Status of Endangered Wildlife in Canada, which in turn advises the Minister of Environment to list, or not, species at risk.

The *Oceans Act* is Canada’s ocean’s **constitution**. It operates at a very high policy level, especially in the development of ocean management strategies whereby the Crown promotes integrated management of oceans and marine resources. Such management entails the participation of First Nations organizations.

In my paper, I have provided a synopsis of the Labrador Inuit Settlement Claims Agreement. This agreement is noteworthy as it was signed on January 22, 2006, the day before the federal election, and

deals with ocean management **and** marine protected areas in Atlantic Canada with respect to marine shipping and oil and gas exploration.

## **SLIDE 7: Offshore Resource Ownership and Jurisdiction**

Let's move to the second key issue (after the environment), that being the determination of ownership **and** jurisdiction over offshore resources. On the north coast, in particular, there is a mixture of federal and provincial positions in light of emerging international maritime boundary-making principles. Added to this "mixture" on the north coast is the position of the United States and Alaska on the demarcation of the international boundary in Dixon Entrance.

Now ownership is **not** the same as jurisdiction. Ownership of a resource is just that, ownership. With ownership comes the ability to profit directly from exploitation of the resource. Jurisdiction, meanwhile, involves the exercise of certain constitutional powers, by either the federal or British Columbia governments, over a resource, no matter who owns the resource.

Until the late 1990s, the common law status quo was essentially an agreement to disagree as between the federal and BC governments on who owns resources in certain areas of the BC offshore.

## **SLIDE 8: BC Offshore Zones/Boundaries**

This schematic slide indicates the position that the BC **government** is likely to have on offshore resource ownership. Essentially a line running parallel with the western coastline of both the Queen Charlotte Islands and Vancouver Island, with a continuation in the open Pacific between Vancouver Island and the Queen Charlottes, in Queen Charlotte Sound.

The two “rubs” to this map are (1) the federal government’s position that Queen Charlotte Sound and some or all of Hecate Strait and Dixon Entrance are federally owned, and (2) the international boundary with the United States and Alaska.

(1) Basically the federal government’s position is that the prime hydrocarbon exploration fairway in Queen Charlotte Sound is under federal ownership. While there may be disagreement, even if BC’s position is the correct one, jurisdictional powers held by the federal government over navigation, shipping and fisheries provide the federal government with regulatory oversight that would impact the orderly development of offshore resources in any event.

(2) The delineation of international boundaries are more complex. The so called “A-B Line”, at the southern tip of the Alaskan panhandle,

is supposed to demarcate the United States/Canada boundary. In fact it likely does not.

On the south coast, as between the State of Washington and BC, the delineation of the international boundary extending seaward from Juan de Fuca Strait is also in dispute.

While purely an academic issue for generations, the precise location of this southern boundary now appears to have implications for offshore development with the discovery of methane hydrates off southwest Vancouver Island.

**SLIDE 9: Boundaries (Offshore Resource Ownership and Jurisdiction (cont'd))**

This next map demarcates more clearly the A-B line to the north and the somewhat amorphous boundary to the south with Washington State.

In very general terms, I have also drawn the boundaries of traditional territories of some, but not all, of coastal BC First Nations who assert Aboriginal rights and title to the BC offshore.

**SLIDE 10: Offshore Resource Ownership and Jurisdiction (cont'd)**

With the assumption that the settlement of hydrocarbon ownership and jurisdiction occurred under the auspices of the unfinished Pacific Accord in the 1980s, one would think of course that ownership, and jurisdiction were no longer in issue.

Well, that is not exactly the case. The common law appears to be showing signs of developing a nascent recognition of other forms of ownership and jurisdiction over the BC offshore. The law appears poised to apply Aboriginal title to offshore areas.

This area of the law is known as the law of “**ocean spaces**”, or the law of “**sea spaces**”.

While Canadian law has made only **fleeting** references to the possibility of Aboriginal title to the offshore and its resources, other Commonwealth jurisdictions have judicially dealt with the issue.

Two cases involving offshore oil and gas and Aboriginal title, presently before the Canadian courts, involve the north coast, with a claim by the Haida Nation to the waters and resources surrounding the Queen Charlotte Islands, **and** to Lake Eire and Lake Huron by an Ontario First Nation. Talisman Energy produces hydrocarbons from under Lake Eire.

Clearly, depending on how the common law evolves, the impact of First Nations' legal position on ownership could be significant for BC offshore oil and gas exploration and development.

## **SLIDE 11: Duties of Consultation and Accommodation**

The third key issue, along with the environment and resource ownership and the role of First Nations in BC offshore oil and gas, involves “the law”. Specifically the emergence of the common law on Crown duties of consultation and accommodation with First Nations.

The emergence of this branch of the law over the last 4 or 5 years has been nothing less than meteoric. Not surprisingly many of the leading Supreme Court of Canada decisions are based on disputes coming from British Columbia.

Suffice to say there has been a lot of activity on crafting legislation and policy regarding resource development by most governments on ensuring adequate and timely discharge of Crown duties of consultation and accommodation.

The court cases that set out the nature and scope of consultation and accommodation duties really started in 1990 [and not 1991 On the slide] with the *Sparrow* decision (a BC case) where the Supreme Court of Canada recognized that constitutionally protected Aboriginal rights could only be **justifiably** infringed by the Crown **if** consultation was undertaken and adequately discharged by the Crown.

The *Delgamuukw* case in 1997 (a BC case), followed by the *Haida* decision in 2004 (a BC case) and the *Mikisew* decision late last year (not

a BC case) each provide a further amplification of the law of the Crown duty to consult and accommodate First Nations. And with each successive court decision, the Crown appears to have been saddled with more and more obligations to First Nations with the result that First Nations hold increasingly strengthened bargaining positions.

Entire two day conferences are now devoted to the topic of the duty to consult and accommodate First Nations, so I will not attempt to canvass the law except to say keep your eye on it (or have your lawyers advise you regularly).

Ultimately, if the Crown does not adequately discharge its duties to consult and accommodate, a project can very easily be delayed.

The duty arises as soon as an Aboriginal right is asserted by an Aboriginal group and the potential of infringement of that right by a Crown decision. And the scope of consultation, and any required accommodation will be proportional to the impact of a given project on the Aboriginal right.

That said, the Crown is very cautious in its approach to First Nations to discharge the Crown duties to consult and accommodate. Licenses, permits, authorizations – basically any form of Crown approval - can not be given until these duties have been satisfied.

**SLIDE 12: Duties of Consultation and Accommodation (cont'd)**

The response by government and industry to the conundrum that is consultation and accommodation has resulted in some interesting developments. The BC government has embarked on an ambitious plan, called the “New Relationship” whereby First Nations and the government are erecting a structure to deal with, amongst other issues, the topic of consultation and accommodation.

Additionally the federal Conservative government has made at least one **pre-election** statement on offshore oil and gas development.

## **SLIDE 13: Government Policy**

### New Relationship

About one year ago, the BC government and the three primary First Nations organizations in the province jointly created a document titled the “New Relationship”. The document is precedent setting on a number of fronts.

The document set out the rudimentary structure of a First Nations and provincial Crown relationship reflecting First Nations concerns regarding Aboriginal rights and title, and the ability of First Nations to benefit directly from such rights and title.

While the document has been criticized in some industry quarters, for the most part the majority of sectors are in a “wait and see” mode to determine the usefulness of the document and the apparent “new relationship” with the BC Crown and First Nations.

The document is a mere 5 pages, but contains a lot of substance. For those who have not read it, I encourage you to review the document. It may surprise you.

There is no doubt that Premier Campbell wants to leave a positive legacy involving First Nations. The New Relationship appears to be the number one policy strategy within the BC Government.

This, I would argue, is good news for businesses reliant on natural resources exploration and development. However it will be the detail that fleshes out the New Relationship document that will be crucial. To that end, the government and First Nations having been meeting regularly. The BC Business Council has been an active participant and cautious supporter of the process to date.

The BC government recently passed legislation to commit \$100 million to a New Relationship Trust Fund. Dave Porter sits on the board of directors of the Trust.

The purpose of the New Relationship fund is to provide money to assist First Nations for a variety purposes: let me got through a list of purposes that is set out in the proposed legislation:

(1) enhance First Nation governments' capacity to negotiate agreements for shared decision-making, land use planning, land and resource management and revenue and benefit sharing,

(2) enhance First Nation capacity to engage in comprehensive community planning and land and resource planning,

(3) enhance First Nations' knowledge and skills to facilitate their ability to take advantage of a range of

(i) economic opportunities, including opportunities with respect to lands and resources, and

(4) foster and facilitate **consultation** with the government;

How the New Relationship folds into offshore oil and gas exploration remains to be seen. However, offshore oil and gas would presumably be included in the ambit of the New Relationship.

### New Conservative Government

On the federal stage, there is precious little information regarding BC offshore oil and gas and First Nations.

At its March 2005 policy convention, the Conservative Party published the following statement on offshore oil and gas development (its reproduced in my paper): **[QUOTE]**

A Conservative Government will promote exploration and environmental assessment of offshore resources on both the Pacific and Atlantic coasts, in cooperation with the provinces, affected First Nations, private industry and other relevant scientific and environmental groups.

## **SLIDE 14: Pointers**

Not surprisingly, a legal and business risk assessment is mandatory in determining the viability of an offshore resource development project.

The assessment must involve a review of the Crown's interactions with First Nations to date and their expected future interactions.

Additionally, a proponent should scope out the nature and extent of asserted Aboriginal rights that may be impacted by a project. In essence, the project proponent is carrying out a First Nations focused due diligence exercise.

I know it is axiomatic to everyone here that relationship building is crucial – for any project. But not just relationship building by the project proponent with a First Nation. Its also relationship building with the Crown, whether federal or provincial, or both.

At the end of the day, it's the Crown that is **responsible** for discharging the obligations of consultation and, where required, accommodation. The proponent may in fact, carry out the mechanics of the consultations, through implied or express delegation from the Crown.

However what the proponent determines to be adequate consultation and accommodation may vary **enormously** from what the Crown views as adequate.

My experience has been that with the multitude of members in the Crown “family”, federal and provincial, including ministries responsible for the environment, fisheries, parks, transport, economic development, resources, and First Nations, is that you are **only as fast** as your slowest family member.

Timely-decision making simply does not arise from the Crown. In part this is due to the Crown upholding the Crown’s **honour** in dealing with First Nations and as such, consultations must not be rushed – they must be thorough and complete.

**Even if** the Crown makes a decision regarding an Aboriginal interest such that a project moves forward, there is no assurance that the Crown has discharged its legal duties to consult and accommodate.

Thus, where possible, a project proponent should attempt to obtain an indemnity or guarantee from the Crown in regard to the Crown adequately discharging its duties. My experience is that this is becoming an infrequent occurrence as the Crown has become very sensitive to First Nations litigation.

**SLIDE 15: Pointers (cont'd)**

For a project proponent dealing directly with First Nations, there are a number of practical, self-help measures that can be carried out. These include **meeting with** and actually **learning about** the First Nation's long history, its values and what it thinks is important. Taking the time to learn about a First Nation community can only help a proponent in successfully launching a project.

Time and again First Nations can not participate in reviews in a manner they view as meaningful. A proponent footing costs or contributing to the expense of *bona fide* consultant, such as in the environmental assessment process is almost a given.

Where the circumstances warrant, a formal business relationship may be entered into with local First Nations. I have listed a bullet point titled "Impact and Benefits Agreements" – IBAs are known by a variety of names, however they all serve the same purpose – to get buy-in from the First Nation in exchange for support of your project. This likely is not news to most of you.

What may be new to you is that the more savvy First Nations are using specific projects as a back door treaty process. Large, long term projects are more likely to attract the attention of a First Nation in that

they may use the project, and the prospect of impeding the project, as leverage with the Crown in treaty negotiations or outstanding litigation.

This is not so much a pointer as a prediction – one in which I will conclude my presentation.

The case law regarding First Nations Aboriginal rights has evolved dramatically the last 15 years, particularly in the last 5 years. It seems every new court decision is a “win” for the First Nations. First Nations increasingly are gaining in bargaining strength, **and experience** in dealing with project developers and the Crown.

For the BC offshore, assuming the moratoria are lifted, I would fully expect that as part of putting a regulatory regime in place is that coastal First Nations will have a sizable role equal to the Crown and industry.

**SLIDE 16: Conclusion and Questions**

That ends my presentation.

Thank for your time and I look forward to answering any questions you may have.