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Do Governments Have a Duty to Consult First Nations about Proposed Legislative Amendments?

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DO GOVERNMENTS HAVE A DUTY TO CONSULT FIRST NATIONS ABOUT PROPOSED LEGISLATIVE AMENDMENTS?

I. Introduction: Consultation and Lobbying 1

II. The Case Law Suggests that the Duty Does Apply to Proposed Amendments 2

III. A Cautionary Tale 5

A. Natural Gas Processing Plants and the Reviewable Project Regulation 5

B. A Joint Proposal to Amend the Reviewable Project Regulation 6

C. No Consultation/No Amendment 7

IV. Conclusion 9

I. Introduction: Consultation and Lobbying

The consultation process is rarely straightforward. More often than not it is interrupted and diverted by delays and missteps, misunderstandings, and conflict. This is especially true in circumstances where: the requirements and parameters of the consultation process are unclear or disputed; the necessary information is not immediately available; the interested parties are not forthcoming (either as a tactic or because of a genuine lack of capacity); or because other supervening issues obscure the path to reconciliation.

In *Haida*, the Supreme Court of Canada mentioned, at para. 51, that "[i]t is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts." And governments and their various agencies have done just that—attempted to provide some structure to the duty to consult by developing and relying on consultation policies, and statutory processes like those set out in the provincial and federal environmental assessment acts. In this way, statutes, regulations and policies enacted and adopted by the Crown have increasingly come to provide a procedural framework within which the Crown expects to work through consultation issues with First Nations. At the same time, it is important to note that—according to the court in *Haida*—"strengthening the reconciliation process" ought to be one of the main purposes of those "regulatory schemes" that the Crown adopts to "address procedural requirements."

In that regard, however, there is a perception that in making recent consultation-related amendments, the federal and provincial Crowns seem to have been primarily motivated by a desire to cut through the proverbial 'red-tape' and 'streamline' permitting processes. Those kinds of amendments are often viewed with suspicion by First Nations; and with good reason. As the court noted in *Sparrow*: "Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests." In that light, it is not surprising that the nationwide Idle No More protests were triggered in large part by unilateral legislative amendments in a federal omnibus bill that seemed to reduce existing statutory procedural safeguards for First Nations' lands and environmental values.

Meanwhile, and in contrast, governments do seem to be comfortable consulting with industry, in unstructured and collaborative ways, about proposed amendments to consultation-related statutes, regulations and policies. The process is commonly called 'lobbying,' and the depth and breadth of the practice can be seen by using the search functions on the websites of the provincial Registrar of Lobbyists and federal Commissioner of Lobbying.[1] The press and others occasionally raise concerns about the influence of lobbyists on government decision-making, particularly as regards the regulation of the energy sector and the environment.[2] In addition, a perception of undue influence can also arise, for example, when senior government officials retire from government to become lobbyists for industry associations.[3] It may be fair to ask whether there is a double-standard when it comes to the ways that government consults with First Nations and with industry; not just as regards the manner of consultation (structured versus unstructured, unilateral/adversarial versus collaborative), but also as regards subject matters (proposed amendments) and timing (before enactment or adoption).

In some respects, it would seem only right and prudent for governments to consult First Nations in advance about proposed legislative amendments and policy decisions—if for no other reason than to ensure that the government is fully informed before making decisions that might affect the interests of First Nations. But, leaving aside prudence and good government, the fact that governments do not normally consult First Nations about proposed legislative and policy amendments begs the question: Is there a legal duty that requires the Crown to consult First Nations about proposed amendments?

II. The Case Law Suggests that the Duty Does Apply to Proposed Amendments

Generally speaking, it is possible to discern a stream of reasoning in the case law that suggests that the legal duty to consult does extend to include a general duty to consult First Nations about proposed amendments to regulations and policies that might affect First Nations interests. The headwaters of that stream are located in the *Sparrow* justification test. In that case, the court held that:

> *Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of* whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, *whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented*. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

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1 See: www.lobbyistregistrar.bc.ca; http://ocl-cal.gc.ca/. See also: Oil, gas companies are top BC lobbyists. *Vancouver Sun*, 21 March 2014; Number of federal lobbyists up sharply. *Ottawa Citizen*, 12 June 2014.

2 For example, see the following links to recent news stories:

http://www.cbc.ca/news/politics/energy-industry-letter-suggested-environmental-law-changes-1.1346258;

http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/oil-industry-successfully-lobbied-ottawa-to-delay-climate-regulations-e-mails-show/article15346866/;

http://www.pressprogress.ca/en/post/big-oil-asks-conservatives-change-your-endangered-species-law-please

3 For example, see: CAPP reaches into Saskatchewan government for new boss. *Globe & Mail*, 18 September 2014.

And it appears that judicial opinion on the duty to consult First Nations about legislative and policy amendments is not limited to the kinds of 'conservation' measures at issue in *Sparrow*. For example, in *Delgamuukw*, at the trial level, Justice McEachern considered the Crown's duty to consult in the context of a general claim to aboriginal rights and title, and in light of the *Sparrow* test. He wrote, at 423:

> … *the ministers of the province and their officers should always keep the aboriginal interests of the plaintiffs very much in mind in deciding which legislation to recommend to the legislature, and what policies to implement in the territory. There should be reasonable consultation* so that the plaintiffs will know the extent to which their use might be terminated or disturbed. A right of consultation does not include a veto, or any requirement for consent or agreement, although such is much to be desired.

In addition, after citing the above-paragraph, the trial judge in *Halfway River* also seems to have suggested that the duty to consult could be generally extended to "proposed legislation" that may affect aboriginal rights. Justice Dorgan wrote, at para. 133:

> Based on the *Jack*, *Noel* and *Delgamuukw* cases, *the Crown has an obligation to undertake reasonable consultation with a First Nation* which may be affected by its decision. In order for the Crown to consult reasonably, it must fully inform itself of the practices and of the views of the Nation affected. In so doing, it must ensure that the group affected is provided with full information *with respect to the proposed legislation or decision* and its potential impact on aboriginal rights.

Then, in *Haida*, the Supreme Court of Canada cited the reasoning in *Halfway River* in answering the question of when the duty to consult is triggered. The court wrote, at para. 35:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1997 CanLII 2719 (BC SC), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, per Dorgan J.

The court went on to cite with approval the New Zealand Ministry of Justice's *Guide for Consultation with Maori* for the general proposition that "policy proposals" should be "tested" by "seeking Maori opinion" on the proposals, before they are finalized, and that the Crown should approach such consultations by being prepared to listen with an open-mind and amend the original proposals in light of Maori views.

Note also that the principle that aboriginal peoples should be consulted about proposed legislative and policy measures is also reflected in the *UN Declaration on the Rights of Indigenous Peoples*. Article 19 provides:

> *States shall consult and cooperate in good faith with the indigenous peoples* concerned through their own representative institutions in order to obtain their free, prior and informed consent *before adopting and implementing legislative or administrative measures that may affect them*.

However, it should also be noted that the Supreme Court of Canada has not yet expressed a definitive opinion on the question posed in this paper. In *Rio Tinto*, the court reviewed the *Haida* test for determining when the duty to consult arises, and briefly discussed what kinds of government conduct can trigger the duty to consult. The court wrote, at paras. 43-44:

> This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers. This accords with the generous, purposive approach that must be brought to the duty to consult.

> Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights. … *We leave for another day the question of whether government conduct includes legislative action*.
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> [citations omitted]

It is interesting to note that, in making the last statement underlined above, the court cited a passage from the Alberta Court of Appeal decision in *R. v. Lefthand*.[4] In that passage, the Court of Appeal wrote:

> … It cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*. *It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council*. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a prima facie breach of an aboriginal right is sought to be justified …

The notion that the courts cannot interfere with parliamentary processes expressed in the above passage from *Lefthand* is consistent with the New Zealand Court of Appeal's reasons in *Te Runanga o Wharekauri Rekohu v. Attorney-General*. In that case, several Maori communities and the Crown reached a treaty settlement, which involved the transfer of commercial fishing quota to a Maori-owned venture and the repeal of an aboriginal fishing rights non-derogation clause in the relevant fisheries legislation. A dissident Maori community opposed to the settlement brought an application seeking to enjoin the government from introducing the amending legislation. The court dismissed the application as having no reasonable prospect of success. It wrote:

> There is an implied principle of non-interference by the Courts in parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice … However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.
>
> … the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment. In our opinion, non-interference with the introduction of a Bill is the corollary of the principle … that an implied right to freedom of expression in relation to public and political affairs necessarily exists in a system of representative government. That right, which is reflected in the Bill of Rights 1688 (UK), being accepted, it is impossible to suppose that a Minister may be judicially prevented from presenting to a representative assembly a measure for consideration.
>
> Closely allied is the conclusion that the Courts would not compel a Minister to present a measure to a representative assembly for consideration. Surely in a democracy is would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament. … The point that does matter, in our opinion, is that public policy requires that the representative chamber of Parliament should be free to determine what it will or will not allow to

4 2007 ABCA 206 (CanLII), 77 Alta. L.R. (4th) 203.

> be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider.[5]
>
> [citations omitted]

However, in *Lefthand*, the Alberta Court of Appeal went on to hold that, while "[t]he integrity of traditional methods of enacting legislation and regulations is not affected by the duty to consult," where the government has convened "study groups" to consider legislative and policy questions, those "study groups" may indeed be required to consult First Nations about proposed amendments prior to making any recommendations to government. In that regard, the court wrote:

> Beyond the passage of legislation and regulations, the matter becomes less well defined. Administrative tribunals often do have a duty to consult when their orders will have an impact on aboriginal rights. *There may also be a duty on study groups that are formed by governments to report on matters that may affect aboriginal rights*. For example, in this case the Eastern Slopes Regulation Review Committee was established in 1997 to make regulations respecting the fisheries covered by Treaty No. 7. *When it is anticipated that such a study group might recommend amendments to a regulatory regime, consultation is generally appropriate*. …

In summary, although it can be argued that there has not yet been a definitive ruling on the question posed by this paper, there is a consistent stream of reasoning in the case law that suggests that the governments must consult with First Nations about legislative and policy proposals that may affect First Nations' interests, *before* those proposals are finalized and adopted. The next section provides an example of this principle in action.

III. A Cautionary Tale

A. Natural Gas Processing Plants and the Reviewable Project Regulation

The natural gas extraction process known as hydraulic fracturing can have a surprisingly extensive footprint on the land. Fracking requires the installation of a significant amount of infrastructure in fairly concentrated areas, including for example; core roads and access roads, large multi-well pads, gathering pipelines, water pipelines and storage pits, waste pits, compressor stations, remote camps for workers, etc. But—despite the fact that all of these kinds of facilities are carefully planned and highly integrated during the development of a gas field—none of these activities are subject to any kind of comprehensive impact review under the provincial or federal environmental assessment acts. Instead, each separate road, well-pad, or pipeline is broken up into small segments, and is permitted by the BC Oil and Gas Commission in a piecemeal, ad hoc way, one relatively minor application after another.

Consequently, First Nations in Northeast BC feel strongly that they are experiencing a 'death by a thousand cuts' and that the oil and gas consultation process is a sham because it does not take into account the 'cumulative impacts' of upstream natural gas development activities. In my view, the First Nations are right about this; the consultation process for upstream oil and gas activities is not fair or reasonable, and it is only a matter of time before some First Nation challenges this process in

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5 [1993] 2 N.Z.L.R. 301 at 307-8.

the Courts, on a grand scale, and wins. In the meantime, FLRNO and the BC OGC seem to be trying to get ahead of the problem with their respective 'Northeast water strategy,' 'cumulative effects pilot,' and 'area basin analysis' projects, so far to no avail.

There is, however, one kind of upstream natural gas facility that is subject to the provincial environmental assessment process and that does hold out at least some promise for a more comprehensive review of upstream cumulative impacts. You see, newly extracted natural gas contains impurities (and valuable by-products) that must be removed before the gas can be pumped into major pipelines and transported to markets. It follows that many new natural gas processing plants will be required in Northeast BC to process the large volumes of gas extracted to supply LNG export facilities on the Coast—estimates suggest that the Montney Basin alone may require 40 new plants capable of processing 200 mmcfd, or 26 new plants capable of processing 400 mmcfd (millions of cubic feet/day).

In that regard, it is important to note that the Reviewable Project Regulation, BC Reg 370/2002 ought to capture all of those new gas plants. It provides that gas processing plants with a design capacity to process natural gas at a rate of ≥ 200 mmcfd are subject to review under the provincial *Environmental Assessment Act*, S.B.C. 2002, c. 43. Further, ss. 10 and 11 of the Act give the Director the discretion to require an environmental assessment of a reviewable project, including "off site … activities related to the reviewable project" and "potential cumulative environmental effects."

B. A Joint Proposal to Amend the Reviewable Project Regulation

So, here's the cautionary tale. In June 2013, Premier Clark directed the Ministry of Environment to review the environmental assessment process for natural gas plants.[6] Documents obtained through FOI indicate that by August 2013 the staff responsible for the review—then called the Natural Gas Plant Proliferation Policy—had established a Project Charter and Joint (Government & Industry) Working Group. The government agencies involved were: Ministry of Natural Gas Development; Environmental Assessment Office; Oil & Gas Commission; and Ministry of Environment. Two industry groups were also involved; Encana Corporation, and the Canadian Association of Petroleum Producers.[7]

The Project Charter described some of the reasons for the policy review in this way:

> … Encana representatives have stated that the EA timeline of 18 months is a barrier to industry and creates an incentive to build <200 mmcfd facilities. EAO has anecdotal evidence this activity may already be occurring. Encana has asked that the regulation be changed to exempt sweet gas processing facilities from the EA process.
>
> EAO and OGC anticipate that cumulative effects concerns (air quality, water quality, wildlife, etc.) will arise when a multitude of new wells and gas processing facilities are proposed. … Additionally, the last two EAs on gas processing facilities in the Horn River Basin have identified significant adverse effects due to greenhouse gas (GHG) emissions.

The Project Charter then went on to note that the duty to consult, and First Nations' interests, expectations and concerns should be considered throughout the Project. It seems odd then, that

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6 Oil Industry Asked BC Government for Gas Plant Exemption. *Globe & Mail*, September 14, 2014.

7 See, generally: http://docs.openinfo.gov.bc.ca/D42628114A_Response_Package_NGD-2014-00062.PDF.

neither the Ministry of Aboriginal Relations and Reconciliation, nor any of the affected First Nations in Northeast BC, were invited to participate in the policy / regulatory review.

The FOI documents go on to indicate that the Joint (Government & Industry) Working Group had several meetings and teleconferences on the subject during the period from September through November 2013, and into February 2014. Drafts were exchanged, presentations were made, tours of processing plants were given, the rules in other jurisdictions were examined, and there was considerable convergence on the rationale for the policy review, the content of a 'joint work plan', and the recommendations to be made to Ministers.

One curious statement jumps out of the record of email chatter between provincial staff—after touring some existing facilities, a senior provincial staff person remarked to colleagues:

> … based on what we learned in Dawson Creek … It became apparent that the EA trigger doesn't have the influence on facilities size/composition that we were led to believe early on. Rather it appears industry is looking for flexibility to support market demand. …

Here is one hint that commercial flexibility was the primary reason for the desired policy changes, not reducing the environmental footprint or managing cumulative effects as previously stated in the Project Charter.

Incidentally, it is telling that the October 2013 edition of *Who's Lobbying Who* published by the BC Registrar of Lobbyists, described Encana's activities for that month in this way:

> Encana Corporation is lobbying a vast number of public office holders on a broad range of issues including skills labour training, energy resources development and international trade.

In any case, the Province apparently agreed with CAPP's preferred recommendation and an Order-in-Council removing the capacity trigger from the Regulation was prepared and approved by Cabinet. Then, on April 1, 2014, representatives from MNGD, EAO, OGC, and FLNRO met to discuss the "Communications Plan." This prompted the EAO to prepare a "Questions and Answers" document for the impending introduction of the amendments, scheduled to occur on April 14, 2014. Among the questions was one concerning what consultation efforts had been undertaken. It reads:

> Did you consult with anyone on these changes?
>
> Environmental Assessment Office staff worked with staff from the BC Oil and Gas Commission and the Ministries of Natural Gas Development, Environment and Forests, Lands and Natural Resource Operations to ensure that there would be no gaps in regulatory oversight as a result of the changes.

Indeed, there is no mention of Encana or CAPP, or the Ministry of Aboriginal Relations, or affected First Nations, in any of the FOI documents related to the announcement of the amendment.

C. No Consultation/No Amendment

As it turned out, the timing of the announcement of the regulatory amendment could not have been worse. The Fort Nelson First Nation—whose territory includes significant natural gas reserves—happened to be hosting a three day conference on LNG from April 14 to 16. Senior members of the provincial government and industry were in attendance. By all accounts, the first day of the conference went very well, Ministers attended by videoconference and confirmed the government's commitment to working together with First Nations, and there was a feeling of optimism about the

future and the strengthening of relationships. Then the province announced that it had amended the Reviewable Projects Regulation to remove natural gas processing plants (and ski resorts) from the list of reviewable projects.

The following day, Chief Sharleen Gale invited some elders onto the stage to open the day's events with songs and drumming. Then, flanked by the elders, Chief Gale took to the podium and chastised the provincial government for betraying the trust that they said they wanted to build with the Fort Nelson First Nation. She then asked all of the provincial representatives to get up and leave the conference. It was quite a procession—the provincial representatives were literally drummed-out of the meeting—and industry representatives were also asked to leave. The events were captured on video and posted on the internet.[8]

Later that day, the provincial Minister of Environment issued a statement apologizing for "failing to discuss the amendment with First Nations prior to its approval" and confirming that the government would rescind the amendment. It is revealing that the statement also includes what seems to be an implied apology to CAPP. It reads in part:

> I would like to acknowledge First Nations concerns about amendments to the Reviewable Projects Regulation under the Environmental Assessment Act. Our government apologizes for failing to discuss the amendment with First Nations prior to its approval.
>
> Our government is committed to a strong, respectful and productive relationship with First Nations. That is why we will rescind the amendment that would have removed the requirement for an environmental assessment for sweet gas facilities and destination resorts, until we have undertaken discussions with First Nations. The Canadian Association of Petroleum Producers (CAPP) has been made aware of this decision, and respects the need for our government to have further discussions with First Nations.

In addition, the Minister of Aboriginal Relations and the Minister of Natural Gas Development were invited to address the Conference by speaker phone. They both apologized and took responsibility for the "mistake" of not consulting before amending the regulation, and advised Chief Gale and the conference attendees that the government would be rescinding the Order-in-Council. It does seem that the mistake was unintended, that the apology was genuine, and that rescinding the Order-in-Council was the right thing to do in the circumstances—but it was perhaps too little, too late. Chief Gale responded by indicating that the First Nations still felt betrayed, that all discussions with government and industry were suspended, and that the only way for the Province to get back to the table was for the Premier to attend a Chief-to-Chief meeting in Fort Nelson.[9]

The Premier did travel to Fort Nelson and relationships were repaired to some degree. The resulting press release explained:

> The Premier and [Minister] Rustad were welcomed with a traditional honour song by young drummers from the community. The 90-minute meeting dealt with issues of concern to the Fort Nelson First Nation, including land stewardship, protection of culture and traditions, and economic development.
>
> Both parties agreed this is a course correction that sets out a new path for their relationship based on a mutual objective to have the most environmentally responsible LNG industry in the world and for First Nations to be partners and key players in B.C.'s LNG strategy every step of the way.

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8 See, for example: www.youtube.com/watch?v=dfN2OHCk4e4.

9 For an audio recording, see: https://soundcloud.com/melissa-shaw-5/fort-nelson-first-nation-lng-summit

> Premier Clark has asked senior officials to work with the Fort Nelson First Nation directly to make decisions that will ensure timely progress toward achieving a safe, sustainable LNG industry that benefits all British Columbians.[10]

To my knowledge there has not been any further activity around the proposed amendments to the Reviewable Project Regulation. The matter seems to have been dropped. However, it's possible that the proposed amendments may have made no practical difference to the regulation of gas processing plants in any case. This is because it appears that the Director has started exercising his discretion under s. 10 of the Act to waive the requirement for an environmental assessment.[11]

Nevertheless, the Province may continue to be exposed on this point. If the Director must exercise his discretion under ss. 10 and 11 of the Act in a manner that is consistent with the honour of the Crown, which seems an obvious point since aboriginal and treaty rights are clearly at stake, then there ought to be considerable pressure on the Director to order environmental assessment reviews of natural gas processing plants, including consideration of cumulative effects. If the Director refuses to do so, that decision could be ripe for challenge and may provide a way for First Nations to put the broader impacts of natural gas development on trial.

IV. Conclusion

The case law suggests that governments are required to meaningfully consult First Nations about any proposed legislative and policy amendments that may affect First Nations rights and interests. That includes consultation on the development and amendment of regulatory processes and policies that purport to give structure to the consultation process itself. Governments that respond to lobbying pressures by introducing amendments to 'streamline' regulatory, consultation, and permitting processes—without consulting First Nations—run the risk of breaching that duty to consult. Further, in the absence of consultation before enactment, it will be more difficult for governments to 'justify' decisions made pursuant to those amendments. The attempt to remove the natural gas processing plant capacity trigger from the Reviewable Projects Regulation is an example of how a failure to consult First Nations about a proposed amendment can cause significant political difficulties for governments. All of this suggests that governments would do well to more actively consult First Nations about proposed amendments to legislation and policies before those amendments are finalized.

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10 http://www2.news.gov.bc.ca/news_releases_2013-2017/2014PREM0040-000568.htm

11 See, for example:
http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_411.html;
http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_424.html.