CASE SUMMARIES

- ***Rob Louie, BMAAAC***
February 27, 2022

(a) Da'naxda'xw/Awaetlala First Nation v. British Columbia (Environment), 2011 BCSC 620 (CanLII)

This was a very lengthy court decision. Da'naxda'xw challenged a decision of the Minister of Environment who refused to recommend changes to the boundaries of a protected area, or conservancy, which is within the asserted traditional territory of the Da'naxda'xw/Awaetlala First Nation. They sought an amendment to the southern boundary of the conservancy to remove some of the land, in order to allow a hydro-electric power project to be assessed in an environmental review process. The Da'naxda'xw/Awaetlala First Nation considered this project to be an economic opportunity consistent with their cultural and ecological interests.

The Da'naxda'xw were not informed about the 2010 Protected Area Policy and were given no opportunity to comment on its application to the boundary amendment request.

It was a win for Da'naxda'xw/Awaetlala First Nation. The court concluded that the Da'naxda'xw are entitled to the following:

1. an order in the nature of *certiorari*, quashing the Minister's decision of April 27, 2010;

2. a declaration that the Minister has a legal duty to consult with the Da'naxda'xw about their request for an amendment to the boundary of the Upper Klinaklini Conservancy, with a view to considering a reasonable accommodation; and

3. a declaration that the Minister failed to fulfill his constitutional duty to adequately consult with the Da'naxda'xw in the course of deciding whether to recommend an amendment to the boundary of the Upper Klinaklini Conservancy to Cabinet.

(b) Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority, 2013 BCSC 2074 (CanLII)

This proceeding is an application for judicial review. Da'naxda'xw/Awaetlala First Nation sought (among other things) an order requiring the Province's Minister of Energy to direct the respondent B.C. Hydro to enter into good faith negotiations with the petitioner Kleana Power Corporation for the acquisition of power from Kleana on the basis of the factors and terms applied to power projects under B.C. Hydro's 2008 Clean Power Call.

BC Hydro wanted the application dismissed because they said it was "plain and obvious" that Da'naxda'xw/Awaetlala First Nation application was not right for a judicial reviewed and in any event, they would lose.

It was a win for Da'naxda'xw/Awaetlala First Nation. The court concluded that it was not plain and obvious, based on allegations in the Proposed Petition, that the Energy Minister's conduct is not subject to judicial review, and went further to say that it was persuaded that the petition is hopeless on the other grounds advanced by the respondents. So, the court dismissed BC Hydo's motion claim and it made an order that the Minister of Energy, Mines and Natural Gas be added as a respondent in these proceedings and the style of cause be amended accordingly.

(c) Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority, **2014 BCSC 1361 (CanLII)**

Da'naxda'xw/Awaetlala First Nation sought an order that the Honourable Richard Neufeld, senator, who was formerly the Minister of Energy, Mines, and Natural Gas in British Columbia, attend for cross-examination on the affidavit which was filed on March 20, 2014, and deliver it to Da'naxda'xw/Awaetlala First Nation on March 21, 2014. Da'naxda'xw/Awaetlala First Nation asked that the cross-examination be before the court at the hearing of the application for judicial review or, alternatively, before a court reporter. Da'naxda'xw/Awaetlala First Nation also wanted an amendment to the case plan order made February 14, 2014, if required, to allow for cross-examination of Senator Neufeld as directed by the court.

It was a win for Da'naxda'xw/Awaetlala First Nation. The court ordered that there be cross-examination of Senator Neufeld.

(d) Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority, **2015 BCSC 16 (CanLII)**

This is a very lengthy court decision. This is an application for judicial review. The court discussed and analyzed evidentiary objections; the level of commitment of the Energy Minister in 2008; whether Da'naxda'xw/Awaetlala First Nation established a basis for a remedy against BC; the duty to consult; public law estoppel; the doctrine of legitimate expectations; and unreasonable decision and abuse of discretion.

It was a partial win for Da'naxda'xw/Awaetlala First Nation. The court concluded that the BC failed in its constitutional duty to consult with the Da'naxda'xw in the course of deciding to establish the Upper Klinaklini Conservancy and whether to recommend an amendment to the boundary of the Conservancy, and has failed in its constitutional duty to consult with the Da'naxda'xw concerning how and whether the Da'naxda'xw's interests may be accommodated; and BC has legal duty to consult with the Da'naxda'xw on those matters, with a view to considering a reasonable accommodation. All other relief (other than costs) claimed in the Amended Petition as against the Energy Minister and the Province was dismissed.

(e) Da'naxda'xw/Awaetlala First Nation v. British Columbia (Energy, Mines and Natural Gas), 2016 BCCA 163 (CanLII)

This case was an appeal from an application for the judicial review of a direction given pursuant to a commitment made by a Minister of the BC to Da'naxda'xw/Awaetlala First Nation and a private company that sought to develop a hydro-electric power project within the Da'naxda'xw/Awaetlala First Nation's traditional territories to their mutual financial advantage.

The project could not be developed without the alteration of the boundary of an environmentally protected area, which would take time and impair the prospect of the company competing for an electricity purchase agreement. The commitment was made in 2008 to provide a solution. The issue was its terms. The Minister was said to have committed to no more than directing the public utility involved to negotiate an agreement with the company (apart from the competition) at such time as it became ready to proceed. That was the direction given four years later in 2012 when, following the court's intervention, the boundary was amended. But, by then the price of electricity had fallen to the extent that the project was no longer viable. The Da'naxda'xw/Awaetlala First Nation and the company contended the commitment had been much broader, requiring a direction to negotiate on the terms and at the pricing of the projects that had been successful in the 2008 competition. On the application being heard, it was held the commitment was limited to the direction that was given. However, BC was declared to have failed in its duty to consult with Da'naxda'xw/Awaetlala First Nation in an attempt to find a reasonable accommodation for which the judge considered Da'naxda'xw/Awaetlala First Nation was entitled to a remedy. The primary ground of appeal was that the judge had made an overriding and palpable error in what she found the commitment to have been. Two alternative grounds of appeal were advanced and the declaration made was challenged by cross appeal.

It was a win for Da'naxda'xw/Awaetlala First Nation, as BC's appeal was dismissed with the cross appeal allowed with the application being brought back to the judge below for his reconsideration. The court concluded that there was no error in the judge's finding of fact as to what the commitment was.

(f) Da'naxda'xw/Awaetlala First Nation v British Columbia Hydro and Power Authority, 2017 BCSC 2179 (CanLII)

In 2008, the petitioner Kleana Power Corporation, an independent developer and operator of hydro-electric projects, was proposing a run-of-the-river hydro-electric project on the Klinaklini River (the "Project"), within the asserted traditional territory of the Da'naxda'xw/Awaetlala First Nation. Kleana wished to submit a proposal in the 2008 "Clean Power Call" issued by the respondent British Columbia Hydro and Power Authority, with a view to being awarded an energy purchase agreement for the sale of electricity generated from the Project to BC Hydro. The Da'naxda'xw considered the Project to be an economic opportunity consistent with their cultural and ecological interests. However, the proposed boundary of a protected area (or conservancy) that was within the traditional territory claimed by the Da'naxda'xw created a barrier to the Project.

Both petitioners say that in 2008, they received an assurance from the respondent Minister of Energy, Mines and Natural Gas (the "Energy Minister") that if Kleana lost the opportunity to participate in the 2008 Clean Power Call as a result of a delay in amending the conservancy boundary, then (when the Project was in a position to proceed) the Energy Minister would direct BC Hydro to enter into negotiations with Kleana for an energy purchase agreement at a price for power that was linked to the results of the winning bids in the Call. The petitioners say that the Energy Minister's assurance was clear, unambiguous and unqualified.

This was a loss for Da'naxda'xw/Awaetlala First Nation. The court concluded that no remedy could be granted, and the case was dismissed.

(g) Da'naxda'xw/Awaetlala First Nation v British Columbia (Attorney General), 2019 BCSC 414 (CanLII)

This action relates to a plan proposed by Kleana Power Corporation, with the support of the plaintiff, to construct a hydroelectric project on the Klinaklini River in the asserted traditional territory of the Da'naxda'xw/Awaetlala First Nation. The purpose of the project is to generate income by the sale of electricity. However, a barrier to the project was that part of the proposed site was within a conservancy located on the Da'naxda'xw/Awaetlala First Nation's traditional lands. The plaintiff sought an amendment to the boundary of the conservancy to allow for the project, but the Minister of Environment refused to recommend the changes. Since then, the project has been the subject of several court proceedings.

The Da'naxda'xw/Awaetlala First Nation's application was filed and served on January 2, 2019. In this application, Da'naxda'xw/Awaetlala First Nation sought a declaration "that the cause of action pleaded in the Notice of Civil Claim is not barred by the doctrine of issue estoppel, as alleged by the Defendant in its Response to Civil Claim".

On December 9, 2018, Da'naxda'xw/Awaetlala First Nation consented to the Province's bill of costs in the Court of Appeal in the amount of $11,225.94. As of the date of this hearing, counsel for Da'naxda'xw/Awaetlala First Nation had not returned the signed bill of costs so that it might be filed with the registrar and the plaintiff has not paid any of the costs despite requests to do so.

Da'naxda'xw/Awaetlala First Nation did not re-pay the costs delivered to it by the Province following the plaintiff's initial success on the first application for judicial review before Madam Justice Adair and the costs awarded by the Court of Appeal, which together total $33,725.94. The plaintiff has, to date, failed to pay the Province this amount despite several requests that it do so.

The court concluded that this action would be stayed (ie paused) unless and until: (a) the Da'naxda'xw/Awaetlala First Nation pays the outstanding costs due to the defendant in the amount of $33,725.94; and (b) the Da'naxda'xw/Awaetlala First Nation posts security for costs in the amount of $10,000.00 in a form satisfactory to the Registrar of this Honourable Court.