

**LEGAL OBSERVATIONS CONCERNING  
THE "DISCUSSION PAPER ON INSTRUCTIONS FOR IMPLEMENTING THE  
NEW RELATIONSHIP" ("Paper")**

**March 9, 2009**

**TO:**

**Jock Finlayson, Business Council of BC  
John Winter, BC Chamber of Commerce  
Pierre Gratton, Mining Association of BC  
Gavin Dirom, Association for Mineral Exploration for BC**

We have not seen the proposed legislation, but for the purposes of this analysis we will assume that the legislation will be based on the language used in the Paper. The observations set out below are preliminary in nature and are not intended to be a complete legal analysis regarding the Paper.

A preliminary observation is that the Paper refers to the legislation being derived from the "new relationship", an unsigned vision statement with no legal effect. To the extent that the language in the "new relationship" was ambiguous, it was open for its authors to have different views as to its meaning. Unlike the "new relationship", different rules apply to legislation. A court will interpret legislation based on its clear language, not the subjective intention of those involved in its drafting.

**1. The legislation will give First Nations a veto.**

Jessica MacDonald (Deputy Minister to the Premier) has advised Industry representatives the use of the phrase "shared decision-making" in the new relationship and the Paper is not intended by BC to give the First Nations a veto.

The Paper simply uses the phrase "shared decision-making" with no additional defining or limiting terms or conditions. A court will likely interpret "shared decision-making" by its plain and ordinary meaning, likely meaning that either both parties agree on a particular action or decision, or no decision is made. As the phrase is currently used, with no other limiting or defining terms, it is clear on its face that both parties (i.e. First Nations and B.C.), will each need to agree to a decision or action subject to this legislation and related processes. In short, First Nations will have a veto over every aspect of resource development in B.C.

Also, First Nations have a clear view as to what is intended by the phrase "shared decision-making" – namely a veto, as expressed in the numerous documents recently made available on the B.C. Union of Indian Chiefs' website associated with the November 2008 "All-Chiefs Assembly on Proposed Recognition Legislation" (see in particular the discussion paper entitled "Shared Decision Making").

**2. The legislation will recognize aboriginal title throughout all of B.C., potentially giving enormous power and control to First Nations and inconsistent with current law relating to aboriginal title.**

Discussions with senior provincial officials regarding the Paper appear to confirm that there is a fundamental lack of understanding by the persons who drafted this Paper for B.C. concerning the significance of recognizing aboriginal title throughout all of B.C.

No final court decision has actually found aboriginal title anywhere in Canada.

The Supreme Court of Canada has ruled specifically on aboriginal title in two decisions (*Delgamuukw* (1997) and *Marshall/Bernard* (2005)), which confirm that aboriginal title is very significant, is a "right to the land itself", is very difficult to prove, and when proven will not be over expansive 'traditional territories' but rather will be found in limited areas where the evidence supports physical occupation of defined tracts of land.

In our view, a paper (attached) delivered on February 27, 2009 by John Hunter QC, Former President of the Law Society of British Columbia, who has also acted on behalf of the Province in many aboriginal law cases, accurately sets out the law relating to aboriginal title. Mr. Hunter's paper concludes that the territorial approach to aboriginal title that is central to the proposed recognition legislation has been "decisively rejected by the Supreme Court of Canada".

It is because aboriginal title is so significant – giving a right to choose the use to which the land is put – that the courts have been so careful about it and have indicated that it will be found only very rarely. Aboriginal title is not commonplace and certainly does not exist throughout the entire province as is proposed by the recognition legislation "without requirement of proof or strength of claim".

The implications of such recognition will be far reaching and have significant repercussions not only regarding the interpretation of the legislation and other provincial statutes and regulations, but also in respect of First Nations' expectations.

The Paper also states that aboriginal title includes a First Nations' jurisdictional component – we are unaware of any material case law that supports this assertion.

**3. The legislation proposes power and control to the First Nations well beyond what has been established by the Supreme Court of Canada.**

Three key points made by the Supreme Court of Canada in *Haida* (2004) were that (a) the Crown's duty to consult does not give First Nations a veto, (b) government can continue to govern and manage the resource in question, (c) and government is in the best position, when acting reasonably, to balance the interests of First Nations with those of the public generally.

All three of these critical points are compromised by the proposed legislation.

Another critical point is that the Supreme Court of Canada in *Haida* set out for governments across Canada a blueprint for legal certainty in governments' decision making. This blue-print calls for basic changes to how governments make decisions to ensure that such decisions meet the honour of the Crown, but also make clear that governments can continue to govern with legal certainty.

#### **4. The legislation has core legal defects.**

The legislation contemplates very significant changes that affect "Indians". It is well established that laws affecting the core rights of "Indians" are within the sole jurisdiction of the federal Crown. The provincial government likely has no authority to make the changes that are contemplated in this respect. We also understand that there has been no federal participation in the development of the proposed legislation. It is difficult to conceive how sweeping changes of this kind could be contemplated without consulting with, and having the agreement of, the only body that actually possesses the legal authority to make laws affecting core Indian rights.

The Paper also states that it would not affect constitutional and common law relating to aboriginal rights, is not intended to affect the status of existing Crown granted interests, does not create any new rights and does not alter the existing division of power between the federal and provincial governments. Despite this, the legislation attempts to legislate in an area of sole federal jurisdiction, will have "priority over all other provincial statutes" and expressly acknowledges that First Nations "exercise authority to make decisions including how the lands and resources will be used and the resources shared" despite there being no basis in law to date supporting such a view.

We are of the opinion it is not at all certain what legal status this legislation will have. The legislation being proposed must be carefully drafted with a view as to how it may ultimately be interpreted. The express contradictions set out in the Paper (not meant to affect the law and yet at the same time completely alter the law and affect every provincial statute) raises significant legal and interpretative challenges and risks.

In addition, regardless of whatever thoughts the Provincial government may have about the limitations on the scope of the legislation, it appears that those limitations are not shared by the First Nations Leadership Council or the First Nations leaders generally. The effect of this legislation will almost certainly raise the level of expectations of First Nations so that it will be practically impossible to do business without first addressing the First Nations' expectation for their consent.

There does not seem to be much likelihood that the 200+ First Nations in B.C. will quickly reconstitute themselves into 30 or so neatly defined "Indigenous Nations" contemplated by the legislation. Even if they did, that would not affect the Province's obligation to consult with them as directed by the Supreme Court of Canada, or the fact that the Federal government, who actually has the power to make laws affecting "Indians", may not accept this Provincial initiative.

The Paper asserts that the legislation will contribute to certainty for third parties. The only certainty arising from this legislation may be the certainty that resource development will be dramatically reduced in B.C. as potential investors look elsewhere, including other Canadian provinces where resource development requires approval only from Federal and Provincial governments.

##### 5. Other concerns

There are a number of other concerns with the proposed legislation which we have not raised in these observations. However, we hope that these observations will be helpful and the further comments can be given when we have more time to consider this, and when more is known about this initiative.

We note that we are trying to comment on legislation that we have not seen in Bill form, and that is only described in the Paper. It is possible that the concerns expressed here may be addressed by the actual language in a Bill, which may be quite different than the language in the Paper. However, our caution, based on the language in the Paper, is that there are enormous and potentially unintended consequences that may arise from this legislation and very careful thought should be given to its language *before* it is put forward as a Bill.

Finally, regardless of what is ultimately in the legislation, there appears to be a wide gulf between the intentions of the Provincial and the First Nations' drafters of the Paper. This raises concerns regarding how practical certainty can result without first reconciling what appear to be different views over fundamental aspects of the new relationship and the legislation.

Sincerely,

*"Thomas Isaac"*

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Thomas Isaac

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