March 12, 2009

Comments by the Executives of the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs on "Legal Observations Concerning the "Discussion Paper on Instructions for Implementing the New Relationship"" (the "Observations") – a paper prepared by Thomas Isaac and Keith Clark dated March 9, 2009

Introduction

The Observations dismisses the *New Relationship* as "an unsigned vision statement with no legal effect". This dismissive approach is disappointing coming from two lawyers who specialize in Aboriginal law and must be familiar with the jurisprudence of the Supreme Court of Canada.

The *New Relationship* vision has its origins in decisions of the Supreme Court of Canada spanning over thirty years, from *Calder* to *Haida*, where the court made clear that the Province's laws and policy are out of date. Embedded in Provincial law is a denial of aboriginal title and a claim by the Province to exclusive Crown ownership and jurisdiction over all lands and resources in the Province – a position which the lawyers representing the governments and industry attempted to justify before the Court, on the basis that aboriginal title has been extinguished in British Columbia. It is worth recalling, at the Supreme Court of Canada in *Delgamuukw*, arguments were made that aboriginal title has been extinguished by Crown grants, including the granting of fee simple tenures. In rejecting these arguments, the Court concluded that aboriginal title has not been extinguished in British Columbia, that it has a jurisdictional and economic component, and that the Crown has constitutional obligations, arising from the assertion of sovereignty, which must be fulfilled when decisions are contemplated that could affect aboriginal title and rights.

These two lawyers must be familiar with this jurisprudence, and on the importance of the principles of reconciliation and the honour of the Crown which lie at the heart of the *New Relationship*.

As the Supreme Court of Canada has said:

> "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[1]
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> "In all its dealings with Aboriginal peoples, the Crown must act honourably."[2]

[1] *Mikisew Cree First Nation v Canada* [2005] 3 S.C.R. 388 at para.1

[2] *Haida Nation v British Columbia* [2004] 3 S.C.R. 511 at para. 45.

Given their importance to the reconciliation of the Aboriginal peoples and non-Aboriginal peoples of the Province and their origin in decisions of the Supreme Court of Canada, both the *New Relationship* document and the *Discussion Paper On Instructions for Implementing the New Relationship* (the "Discussion Paper") deserve more respect and understanding than is shown in the Observations.

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

The Observations make this sweeping statement on the basis of the supposed lack of detail in the *Discussion Paper* on how shared decision-making will be implemented and the supposed expressions of views in "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')."

There is nothing in the *Discussion Paper,* or in the papers referred to by these authors, that embed a principle of a First Nations veto. The details of how shared decision making will take shape on the ground have yet to be discussed between the Parties, and input from the business community about this work going forward is both expected and welcomed. The *Discussion Paper* makes clear that recognition will be made operational through shared decision making and revenue and benefit sharing, and that this will be based on agreements between the Province and Indigenous Nations at the comprehensive and interim levels. These agreements will be collaboratively developed – see "Shared Decision-Making and Revenue and Benefit Sharing" at page 3. Dispute resolution processes will be available to assist the Parties in harmonizing decisions, and resolving disagreements, outside of going to Court: see pages 1 and 4 of the *Discussion Paper*; establishing processes of shared decision-making and dispute resolution is in accordance with the decision of the Supreme Court of Canada in the *Haida* case.

The references to the documents on the B.C. Union of Indian Chiefs' website also misstate what is in those documents. The word "veto" does not appear. In fact, page 5 of the discussion paper on "Shared Decision-Making" states, "shared decision-making is a process where decision makers with respective jurisdictions, authorities and laws engage in a joint process of decision-making towards reaching compatible or common decision." Page 7 states, "it must be acknowledged at the outset that neither party has a legal right to make and impose a unilateral decision at the end of the day – the emphasis is at all times on finding ways to move ahead together." Reference is made to dispute resolution processes to resolve inconsistent decisions. The *Discussion Paper* also includes provision for dispute resolution processes – see pages 1 and 4. The statement about First Nations having a veto is obviously intended to raise alarm among the industry clients of the authors of the Observations. However, they ignore the benefit of shared decision-making to industry as identified at page 4 of the discussion paper on "Shared Decision-Making":

> "2. Shared decision making can provide a new level of certainty.
> One significant source of social and economic uncertainty is that the status quo of unilateral Crown decision-making often leads to significant conflict

> with First Nations about land and resource decisions. Shared decision-making will lead to decisions which provide greater certainty to tenures granted to third parties. Further, First Nations decision-making roles in management and tenuring guard against the Province passing legal defects on title to third parties prior to the conclusion of treaties throughout the Province."

The Observations further state that "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." It is true that the Legislation will recognize Aboriginal title existing throughout British Columbia. This is a moment of great importance in this Province's history – recognition will formally end the illusion that the land was terra nullius when the settlers arrived, and will end the enormous cost of litigation proving the obvious. Recognition paves the way for reconciliation to occur.

The Observations contains the following comment: "the [Discussion] Paper also states that aboriginal title includes a First Nation's jurisdictional component – we are unaware of any material case law that supports this assertion." (p. 2). This comment overlooks the decisions of the Supreme Court of Canada in *Calder* and *Delgamuukw* that clearly support a jurisdictional component to title. In *Calder*, Judson J.'s basic definition of title includes reference to organized societies.[3] In *Delgamuukw*, the Aboriginal nation's decision making power is clearly identified:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community…
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> …First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.[4]

Kent McNeil, a leading author, whose views have been accepted by the Supreme Court of Canada commented in "Aboriginal Title and the Supreme Court: What's Happening?" 69 Sask. L.R. 281 at 286-287.

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[3] [1973] S.C.R. 313 at 325.

[4] [1997] 3 S.C.R 1010 at paragraphs 115 and 166.

> … unlike other property rights that are held by either living persons or corporations, Aboriginal title is vested in collective bodies that evidently have the legal personality necessary to hold property in their own right. Moreover, the decision-making authority Aboriginal communities have in regard to their Aboriginal title lands is governmental in nature, as was held by Williamson J. in *Campbell v. British Columbia (Attorney General)*. Aboriginal title therefore has a jurisdictional quality that distinguishes it from land titles held by private persons and corporations.

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

Recognition of aboriginal title is consistent with the law, as are the establishment of new processes and institutions to make operational and harmonize aboriginal and crown laws.

In making the bold statements they do, the authors place reliance on one supposed key point made by the Supreme Court of Canada in *Haida* which is that "the Crown's duty to consult does not give First Nations a veto." This comment was made in the context of the Court distinguishing between asserted and established Aboriginal rights and title and must be read in the context of the judgment of Lamer C.J. in the *Delgamuukw* case that, in some cases, the nature and scope of the Crown's fiduciary duty in Aboriginal title cases "may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[5] In a paper, Mr. Isaac himself notes "imposing on the Crown a duty to obtain the consent of Aboriginal groups effectively grants Aboriginal groups a veto over potential activities subject to the duty."[6] The Courts have not been definitive in clarifying the terms of engagement, or the appropriate jurisdictional interplay between First Nations' and Crown governments.

However, as noted above, the *Discussion Paper* does not propose that the legislation will contain a provision that Indigenous Nations will have a veto. Rather, it proposes shared decision-making and a dispute resolution process. These proposals do not go "well beyond what has been established by the Supreme Court of Canada" as alleged in the Observations. In fact, in the *Haida* case, the Court expressly anticipated "formal participation in the decision-making process" by Aboriginal peoples and that "[t]he government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision makers in complex or difficult cases."[7]

The Observations also claim that the proposed legislation will somehow compromise the ability of the government to govern and manage the resource in question and act to

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[5] At paragraph 168.

[6] Thomas Isaac, "Aboriginal Title"(Saskatoon: Native Law Centre, 2006) at 39.

[7] [2004] 3 S.C.R. 511 at paragraph 44.

balance the best interests of First Nations with those of the public generally. These observations are not explained in the context of the case law setting out the existing limitations on the exercise of government powers arising from the duty of the Crown to justify any infringement of Aboriginal rights and title. Nor is it explained how the proposed legislation will compromise efficient management of resources or the balancing of the best interests of the First Nations and those of the public generally. To the contrary, the Supreme Court of Canada has described aboriginal people as having a "… history of conservation-consciousness and interdependence with natural resources". The Court's comments, together with leading scholars', have reflected on the effective stewardship embedded in First Nations' laws, culture, and spiritual practices, and to the great benefit this wisdom will bring, when First Nations have an effective say in the management of the land and resources.

The legislation seeks to bring about an improvement in management of the resources through shared decision-making, and an improvement in the way we do business in this Province. Since the *Haida* case, there have been dozens of cases brought before the courts, the vast majority of which have been won by First Nations. The Province's unilateral policy of granting tenures falls below a legal minimum, with Crown granted tenures suffering fundamental legal defects. The Act will change this uncertain legal landscape, and result in greater process certainty, with agreements guiding relationships between First Nations and Government.

3. "The legislation has core legal defects"

The Observations claims that the "provincial government likely has no authority to make the changes that are contemplated" and that the proposed legislation "attempts to legislate in an area of sole federal jurisdiction." These observations misstate the powers of the Province. It is correct that the Province cannot enact legislation that regulates Aboriginal rights and title or that imposes obligations on Aboriginal peoples. This is because Aboriginal rights and title are constitutionally protected by section 35(1) of the *Constitution Act 1982* and are matters falling within the exclusive legislative competence of the federal government under section 91(24) of the *Constitution Act 1867*. However, the Province can enact legislation that guides Crown conduct in its engagement with Indigenous Nations. The proposed legislation is designed to guide Provincial Crown conduct in recognizing Aboriginal rights and title and in establishing processes for shared decision-making and revenue and benefit sharing. These matters are within the legislative competence of the provincial government.

The Observations also challenge the assertion in the *Discussion Paper* that the legislation will contribute to certainty for third parties and claims that "the only certainty arising from this legislation will be that resource development will be dramatically reduced in B.C. as potential investors look elsewhere". The alarmist tone of this observation, like the intemperate comments made elsewhere in the Observations about provincial representatives, is not conducive to informed discussion about one of the most important challenges facing all British Columbians – the reconciliation of Aboriginal and non-Aboriginal people as urged by the Supreme Court of Canada. As noted above, the proposed legislation will add to certainty by avoiding conflict with First Nations land and

resource decisions made unilaterally by the Province and it will avoid disputes over the validity of title granted by the Province.

4. "Other Concerns"

The Observations conclude by stating that:

> "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."

The Observations do not provide support for the speculation that there is "a wide gulf between the intentions of the Provincial and the First Nations' drafters of the Paper". In fact, the *Discussion Paper* is as a result of close cooperation between the representatives of the Province and of the First Nations involved in its drafting. It was jointly issued and approved of through resolutions of the Chiefs in British Columbia in recent Assemblies. This collaborative approach augurs well for the implementation of the New Relationship through the passage of the proposed legislation as part of the process of reconciliation.