A LEGISLATIVE PROPOSAL:

THE INDIGENOUS NATIONS RECOGNITION ACT

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What is the Proposal?

This year will be the 150th anniversary of the establishment of the colony of British Columbia. For Indigenous nations, and other British Columbians, to have cause to celebrate the Province's 150th anniversary, BC must forever turn the page on colonial denial of Aboriginal title, and remain fully committed to forging a new relationship on the basis of recognition.

Since the New Relationship was developed in the spring of 2005, we have had an opportunity to try out approaches and learn from our experiences. The Legislative Proposal reflects on these experiences and is presented as an innovative approach to achieve recognition by this anniversary date and to achieve stability in British Columbia through the implementation of the New Relationship commitments of respect, recognition and accommodation of Aboriginal title and rights. This will give all British Columbians something to celebrate: a turn in the tide of uncertainty. The Proposal provides a framework to maintain an ethical standard of Crown conduct in all its dealings with lands and resources in BC and an implementation plan to the New Relationship, with new tools and policy guidance to government officials. As confirmed by the courts, "the honour of the Crown is always at stake in all dealings with aboriginal peoples"; this "is not a mere incantation, but rather a core precept that finds its application in concrete practices." The Proposal is about identifying concrete practices.

The Proposal has three parts. First, the legislation would set out **recognition principles** to guide Crown conduct when decisions are contemplated over lands and resources in BC, where Aboriginal title has not been extinguished, and where the Crown has notice of an Indigenous nation's historical and contemporary relationship to the land. Second, the legislation would contain a provision that could **create space** for the fulfilment of constitutional obligations and overcoming barriers to the implementation of the New Relationship commitments. Finally, the

legislation would adopt a **New Relationship Implementation Agreement**[1] negotiated between the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations (the First Nations Leadership Council) and the Province, which would establish a framework for respectful terms of engagement, new tools to negotiate agreements based on recognition, and the creation of new dispute resolution institutions to make the New Relationship Vision a reality. In particular, the Agreement would incorporate:

(a) a code of Crown conduct which identifies the shifts necessary to achieve honourable engagement;

(b) the negotiation of protocols about shared decision making, resource and benefit sharing and land use planning;

(c) new dispute resolution processes;

(d) a more efficiently functioning engagement between the Leadership Council and the Province; and

(e) mechanisms for engaging Canada.

Why Do We Need Legislation?

The New Relationship Vision states an agreement " ... to establish processes and institutions for shared decision making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title "in its full form", including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by section 35. These inherent rights flow from Indigenous nations' historical and sacred relationship with their territories".

While the Province has taken positive steps towards relationship–building, the New Relationship has not translated into measurable recognition of Aboriginal title or the establishment of processes and institutions to negotiate government-to-government recognition-based agreements

[1] One precedent for attaching an agreement as part of legislation is the agreement reached between Alcan and BC: see 1949 Industrial Development Act, c. 31 and Agreement between Alcan and BC Government dated December 29, 1950.

to advance reconciliation. The principles articulated in the New Relationship Vision are irregularly or inconsistently adhered to or disregarded by the provincial bureaucracy; the New Relationship action plan remains largely inactive, particularly regarding legislative and policy change; the development of new institutions or structures to negotiate the four government-to-government agreements has not yet occurred; and, there has been little progress made towards shared decision making or revenue sharing, which are the principal tools to implement recognition of Aboriginal title through negotiation rather than through the courts.

Third party interests in BC are particularly vulnerable if there is no systemic shift in Crown conduct, laws, policies and institutions to ensure the honourable discharge of Crown obligations. The court in *Tsilhqot'in* made clear that a consequence of a declaration of Aboriginal title is that provincial laws, such as the current *Forest Act*, will be constitutionally inapplicable to Aboriginal title land, a situation which will impair third party tenures. This situation can be avoided by honourable Crown conduct so that Indigenous nations no longer need to turn to the courts as the venue to compel reconciliation and recognition of Aboriginal title by the Crown. Increasing frustration within Indigenous communities about the failure of the New Relationship to produce a vital and on-the-ground shift to recognition will require change to occur, one way or another. Indigenous nations prefer respectful negotiation, rather than expending scarce resources and limited capacity on litigation.

The lack of real indicators of progress being sought by Indigenous nations in implementing the systemic shifts contemplated by the New Relationship points to the urgent need for a concise implementation plan that provides useful tools and creates new institutions and frameworks for recognition-based agreements and dispute resolution. Reaching agreement about implementation is the best plan forward as the New Relationship embraces jointly developed commitments, reached through extensive collaboration by the Province and organizations representing Indigenous nations. These commitments – and the context in which they were made – were significant and groundbreaking. Efforts must be made to continue to fully realize them through on-the-ground collaboration. This Legislative Proposal carries the support, in principle, of the Indigenous nations' political organizations in BC (see Resolutions) and provides the opportunity to globally guide over-arching changes needed for recognition-based relationship-building, leading to reconciliation.

There is a striking parallel between what the courts have said about reconciliation, what Indigenous leaders have said, and the Vision Statement about the New Relationship made by the Premier on May 4, 2006:

> ... Together, we are committed to building a constructive, new government-to-government relationship, based on mutual respect, recognition, and reconciliation.
>
> ... We are committed to pursuing new horizons of hope and opportunity, by moving beyond the barriers that have held us back for far too long.
>
> ... We will work with the Leadership Council and Aboriginal people on- and off-reserve to ensure that the Crown's commitment to closing the gaps is met – one way or another.
>
> We know that will demand new approaches, new partnerships, new revenue sharing and significant new stable, long-term resources.
>
> ... The future of First Nations as a true partner in Canada, with constitutionally protected rights and title, warrants a fundamental rethinking of Confederation.

Statements by the courts include the following words spoken by the Chief Justice of the Supreme Court of Canada:

> ... s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment.
>
> And it [s. 35(1)] seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.
>
> ... More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially-authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

On November, 30, 2007, Indigenous Leaders from across British Columbia issued a Declaration affirming Aboriginal Title to their respective traditional territories across British Columbia. The Declaration ," All Our Relations", illustrates Indigenous nations unity and intent to embrace and implement the reconciliation principles set out in *Tsilhqot'in Nation v. BC* and other decisions of the courts.

The next year and a half is critical. Either we continue the climate of uncertainty (with challenges of the status quo by Indigenous nations through legal or other means) and risk continued poverty (and the tragic incidences of poverty such as suicide), or we can work together to design change, building on the mutual commitments we have already made.

How Do We Get to Agreement About the Legislation and the Implementation Agreement?

We attach a model *Recognition Act* and *Implementation Agreement*, as a snapshot to what Indigenous nations would like to see contained in the Legislation and the Agreement. These are not presented as 'bottom lines', but to make clear Indigenous nations' priorities and to serve as a basis for collaborating on a conceptual document the Province and Indigenous nations can together endorse.

The First Nations Leadership Council ("FNLC") proposes the following process for your consideration:

1. Discussions towards producing a joint conceptual document to guide legislative drafting and implementation agreement will take place directly between the Premier and his Office and the FNLC.

2. The Premier and the FNLC will each appoint a coordinator to be the first point of contact between the Parties and a drafting team, not to exceed three people for the Province and three for the FNLC. The team, including the co-ordinators, will retreat for 10 days in January or February, with direct access to their Principals, to achieve a mutually acceptable joint conceptual document, which has the support of the Principals.

3. The Model *Recognition Act* and Implementation Agreement will serve as a starting point for the drafting team at the retreat.

4. The drafting team will complete their joint draft conceptual document by the end of February.

5. The FNLC will host a Indigenous nations Governments assembly in March, 2008 to seek approval for the draft, as required by the Resolutions.

6. Legislative and agreement drafting will occur thereafter, with the involvement of the FNLC (similar to the process used to draft the New Relationship Vision and the New Relationship Trust legislation) (details to be confirmed).

Honourable Mr. Premier, we seek from you the following:

1. a commitment to Recognition Legislation in principle;

2. a commitment to putting the right team in place to design the legislation and to negotiate an Implementation Agreement; and

3. timelines for getting the work done, so that legislation is introduced in the spring session of 2008.

THE RECOGNITION ACT:

A PROPOSED MODEL

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1. Purposes

➢ The purposes of this Act are:

a. To implement the New Relationship by adopting and accepting the New Relationship Implementation Agreement attached as Schedule 1.

b. To establish a set of principles to guide the conduct of British Columbia, its officers, employees, agents, and institutions, in its relationship and interaction with Indigenous nations, their government and members; including to ensure that the Province has properly discharged its constitutional obligations arising from unextinguished Aboriginal title existing in the Province.

c. To create new tools for negotiating accommodation, interim measure agreements, and relationship building towards reconciliation.

2. Recognition Principles[2]

➢ British Columbia adopts as a guiding standard for all conduct, including the creation and implementation of all enactments and policies, the following principles:

a. Recognition of the pre-existence of sovereign Indigenous nations in British Columbia who are the original owners and stewards of their lands and resources;

b. Reconciliation of the pre-existence of Indigenous societies with assumed Crown sovereignty;

c. Recognition of unextinguished Aboriginal title and the acknowledgment that Aboriginal title has a jurisdictional and economic component, including making

[2] These principles are derived from section 35 jurisprudence.

decisions about how the lands and resources will be used and deriving benefits and revenues from the use of those lands and resources;

d. Recognition that the dignity, well-being and survival of Indigenous nations, their laws, and their ways of life are vitally important and are dependent on the continuation of their relationships with the lands and resources of their territories;

e. Recognition that free, prior and informed consent of Indigenous nations is the honourable way to achieve certainty when the Crown contemplates decisions which will impact Indigenous nations' territories, and their ancient cultures which are land dependent; and

e. Recognition that the honour of the Crown depends on good faith negotiations, respectful treaty relationships and treaty implementation, and the Crown fulfilling obligations based on principles of recognition of Aboriginal title.

Agreement

- The New Relationship Implementation Agreement is hereby adopted and accepted.

Interpretation

- All provincial enactments and policies will be interpreted and applied in a manner that is consistent with this Act, whether enacted before or after the commencement of this Act.

- Notwithstanding any provision in any enactment, whether enacted before or after the commencement of this Act, British Columbia may take action aimed at meeting obligations owed to Indigenous nations and upholding the honour of the Crown, including entering into any agreements with Indigenous nations to meet obligations of consultation and accommodation.

- Every enactment shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under Section 35 of the *Constitution Act, 1982*, and not to

abrogate and derogate from them.[3]

[3] Language proposed in a recent Senate Report

THE NEW RELATIONSHIP IMPLEMENTATION AGREEMENT:

A PROPOSED MODEL

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A PROPOSED MODEL

BETWEEN:

First Nations Summit
Union of B.C. Indian Chiefs
B.C. Assembly of First Nations

("The First Nations Leadership Council")

AND:

The Province of British Columbia

("the Crown")

I. Implementing the Honour of the Crown

1. Guidelines for Engagement

This section would set out a code of conduct for recognition-based engagement, which would spell out how the Ministers and other Crown officials would engage respectfully with the concerns of Indigenous nations and meet Crown obligations

The Parties agree that recognition based engagement between an Indigenous nation and the Crown means that the following guidelines must be adhered to:

(a) **Crown Inquiry**: For the purpose of discharging obligations, and meaningfully working to build a government-to-government relationship with each Indigenous nation who holds Aboriginal Title and Rights, the Crown must acknowledge and demonstrate respect for Indigenous nations by appropriately inquiring of Indigenous nations about the proper title holder and about their title and rights.

The inquiry will be a "land-based" inquiry – in other words, it will not be in relation to a particular project or proposal, but an inquiry around the appropriate territory, which can then universally inform all Crown engagement, including

addressing cumulative impacts when specific projects and proposals are considered.

Exchanging proper baseline information to assess the impact of decisions to the land base is an important aspect of the inquiry.

It is understood and acknowledged that the process of reconstituting Indigenous nations governments as part of the process of decolonization is an ongoing one and that, in some situations, the identification of the proper title and rights holder will engage Indigenous nations' territorial disputes (e.g. overlaps or shared territories) which will be addressed through new processes or institutions directed by Indigenous nations and supported by the Crown through capacity resources for dispute resolution. In such instances, the Crown will seek guidance from the Indigenous nations involved on the proper way to engage in that circumstance.

(b) **Protocol**: As part of the Crown Inquiry, the Crown will negotiate a Protocol with any Indigenous nation who may choose to pursue such a Protocol. The Protocols will reflect the principles contained in the *Act* and the standards outlined in this Agreement. The Protocols may also include mechanisms for Crown engagement with the Indigenous nation(s) and provision of capacity funding for the implementation of the Protocol, as negotiated between the Crown and the Indigenous nation.

(c) **Capacity**: The Crown recognizes that lack of capacity is a serious obstacle to recognition-based engagement between the Crown and Indigenous nations. The Crown agrees Indigenous nations require sufficient capacity for purposes of engagement, and will work with Indigenous nations to achieve solutions to capacity issues.

(d) **Scope of Impact and Infringement**: Engagement by the Crown concerning particular projects and proposals shall be focused on an inquiry into the scope of impact and infringement, and the possibility of finding a collaborative way forward concerning the proposed use of land and resources that is at issue.

The Crown, through a Protocol, or if there is no Protocol, generally, shall invite Indigenous nations to identify a list of priority interests. The priority interests as identified by each Indigenous nation are those issues involving the allocation of resources or affecting the land which have been identified as being of particular immediate importance for that Indigenous nation. For those items identified as a priority, the Crown will engage in a global, strategic-level collaborative assessment of that interest with the Indigenous nation prior to any further decisions being respecting that interest. The goal of the collaborative assessment is to reach an interim agreement concerning that interest that will provide a positive foundation for on-going engagement between the Crown and the Indigenous nation.

It is important that the role of the proponent in consultation processes and in providing funding for Indigenous nations to consider a proposal, be collaboratively identified between the Province and Indigenous nations and clearly communicated to the proponent.

2. Negotiation of Recognition-Based Agreements in the Areas of Land Use Planning, Management, Tenuring and Resource and Benefit Sharing

The Parties agree that the objective of the government-to-government relationship is reconciliation and that recognition of unextinguished Aboriginal title is a prerequisite to reconciliation. To this end, the New Relationship Vision calls for the development of mechanisms to facilitate the negotiation of government-to-government agreements in the areas of land use planning, tenuring, management and resource and benefit sharing.

The Parties agree:

- **Strategic Decisions**: The Province will engage in collaborative planning with Indigenous nations, in all strategic-level planning and decision-making, in a manner consistent with the Act and Agreement.

- **Shared Decision-Making for Land Management and Tenuring**: The Crown will engage in shared decision-making with Indigenous nations consistent with the Act and

the Agreement.

- **Resource Revenue and Benefit Sharing:** The Crown agrees that Indigenous nations must derive revenue and benefits from the use of land and resources within their Territories, and that revenue and benefit sharing are a component of recognition which must be reflected in accommodation, other interim measures and reconciliation agreements.

The Parties agree to negotiate model framework protocols which pertain to the four agreements, which individual Indigenous nations, or groupings of Indigenous nations, may choose to opt into with the Province with respect to their territories.

(a) Land Use Planning

Land use planning is a necessary and effective tool to simplify the discharge of Crown obligations, on a landscape level, rather than on a decision-by-decision basis.

The joint Land, Marine and Resource Planning Working Group is nearing completion of its work on a Protocol on Collaborative Strategic Land, Marine, and Resource Use Planning that is being recommended to the First Nations Leadership Council and the Province. Implementation of the Land, Marine and Resource Planning Protocol, and associated management tools, directly with Indigenous nations represents an opportunity for on-the-ground change, as contemplated in the New Relationship commitments. With capacity secured, these changes can start to be implemented on a priority basis.

This section would contain the commitment that the Protocol reached would be appended to this Agreement, upon completion.

(b) Shared Decision-Making for Land Management and Tenuring: There is currently a lack of agreement between the Province and Indigenous nations about the definition of the term "shared decision making". For the purposes of this Agreement, shared decision-making means a collaborative approach to assessing

the impact a decision will have on Indigenous nations' land and culture, including (and not precluding) a shared process for final decision-making. This may be achieved through Indigenous nations and Crown decision-makers reaching consensus on their respective decisions, or through agreed-upon models of how decisions can be made jointly.

There is also currently a lack of agreement about the jurisdictional space for the co-existence and operation of Indigenous laws, and the jurisdictional interplay between Crown and Indigenous laws.

This section would outline the steps and timelines for the completion of a shared decision making protocol, and the commitment that the protocol reached would be appended to this Agreement upon completion.

(c) **Resource Revenue and Benefit Sharing**: The Province recognizes the need for revenue and benefit sharing. The Courts have made clear that there are constitutional limits on the Province's title and jurisdiction flowing from ss. 91(24) and 109 of the *Constitution Act, 1867*, in light of unextinguished Aboriginal title in British Columbia. Further, Aboriginal title has been held to embrace an economic and jurisdictional component.

This section would outline the steps and timelines for the completion of a protocol on revenue and benefit sharing, and the commitment that the protocol reached would be appended to this Agreement upon completion.

3. New Mechanisms for Dispute Resolution

The Parties recognize that approaches to engagement and reconciliation are dynamic and evolving, and that achieving recognition requires a "learning" attitude and process which will, in turn, help to bring about a "cultural shift" within government on the requirement of reconciliation. Hard bargaining, rigid and restricted mandates, and "take it or leave it" approaches, are antithetical to this requirement and not conducive to reconciliation. Indigenous nations and the Crown will engage in a collaborative review of their modes of

engagement, and systematically discuss what is working, what is not working, and identify changes as needed.

The Parties recognize and agree that new institutions for dispute resolution are needed to achieve systemic changes. This section would establish new tools to assist the transition towards reconciliation. Options for new institutions include, for example:

(a) **Territorial Boundary Disputes and Disputes About Representation**: The Parties recognize and agree that capacity funding should be provided for a new institution for Indigenous nations to address territorial overlap issues through a dispute resolution process, designed and controlled by Indigenous nations.

(b) **Panel of Mediators and Facilitators**: This would not involve the creation of a new institution. As a first step to resolving an Indigenous nation/Crown dispute outside the court process, the Parties could establish a panel of mediators/facilitators, with guidelines about how these outside experts can be used and paid for.

(c) **Panel of Arbitrators**: If an Indigenous nation and the Crown have a dispute about how the Crown was implementing the principles (or the agreement) on a specific matter, the issue could be sent to arbitration for a binding decision. This would provide Indigenous nations with a clear route to getting a binding decision on a specific matter without either party having to go to court.

(d) **Honour of the Crown Tribunal**: This is a tribunal to whom an Indigenous nation could lodge a complaint about Crown conduct in the course of engagement concerning a decision. The tribunal could have a non-binding role to play to settle disputes in the course of a consultation process that is ongoing and a binding role to play by agreement of the Parties. The tribunal could also monitor the application of the principles (and the Agreement), and make recommendations or provide remedies to the Parties.

(e) **Honour of the Crown Auditor**: This is an institution that could "audit" the application by the Crown of the principles (and the Agreement). It would do this

through reports, perhaps tabled in both the legislature, and at joint assemblies of the UBCIC, the First Nations Summit, and BC Assembly of First Nations, or their successors. The main power of the auditor would be moral suasion. It would make findings and recommendations.

(f) **Honour of the Crown Legislative Reform Advisor**: This section would create a new role for an expert advisor to review existing enactments and policies and to advise the Province and the Leadership Council on legislative changes that should be made in order to be consistent with the Act. The Advisor would be jointly appointed, and report to both Parties. The Agreement would list a set of priority enactments that the Advisor should review first. The Advisor is forward looking, aiming to create a recognition-based legislative universe in British Columbia.

II. New Relationship Implementation – Supporting Political Process

This section will outline the Process to be followed by the political executives of the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations (the "First Nations Leadership Council") and British Columbia to implement the New Relationship Vision at the provincial level to complement the Province-Indigenous nation relationship building set out above. The Process is intended to significantly advance the New Relationship Vision quickly, efficiently, and more productively then efforts to date.

The Process will consist of the following:

1. **Political Table**: The Political Table will entail regular meetings of the First Nations Leadership Council and the Premier, and the Minister of Aboriginal Relations and Reconciliation, on a quarterly basis, with set dates to be attached as a schedule to this Agreement, to identify priorities and to discuss progress, and obstacles to progress, under the New Relationship.

2. **New Relationship Main Table**: The Main Table will consist of the First Nations Leadership Council and the New Relationship Cabinet Committee. The Main Table will meet not less then four times a year, and as issues arise which must be addressed. Each

meeting will be, at a minimum, one day, and at least once a year the Main Table will meet in a two-day intensive session.

3. **Ongoing Political Engagement**: The First Nations Leadership Council will continue to meet with various Cabinet Ministers as necessary on specific issues.

4. **Senior Officials Table:** The Senior Officials Table will consist of the Deputy Minister of Aboriginal Relations and Reconciliation, another Deputy Minister, and one Senior Official of each of the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations. The Senior Officials Table will collaboratively:

   - Receive instructions and implement the agenda set by the Political Table and Main Table
   - Share information as is necessary to inform preparation for Main Table meetings
   - Direct the work of the Implementation Panel

   The Senior Officials Table will meet a minimum of once each month, for at least a full day each time.

5. **Implementation Panel:** The panel will consist of three members appointed by the First Nations Leadership Council and two members appointed by British Columbia. At least one of the members appointed by each of the Parties will be full-time in their role as a panel member.

   The panel is responsible for implementation of the Vision as outlined in this Agreement, including ensuring the deliverables outlined in the workplan (attached as an Appendix) are met. In particular, the panel will direct and ensure working groups complete the work as assigned, and will complete other work directly through discussions at the panel level.

   The panel members will have direct access to their respective members of the Senior Officials Table, and through them to the Main Table members, as is required in their day to day work to ensure that the implementation of the Vision is moving forward.

This section will include a Workplan with 3 month, 6 month, and 12 month deliverables, and clear assignment of the required work. The Workplan should be developed and refined based on existing plans going forward, and new priorities. There will be a mechanism for reviewing progress, and ensuring milestones are met.

This section will include provisions regarding capacity funding for the New Relationship Main Table, Senior Officials Table, and the Implementation Panel, as well as the internal work of the First Nations Leadership Council.

6. **Other Processes:** The First Nations Leadership Council and Province may participate in other processes (e.g. tripartite tables) to implement commitments.

7. **Dispute Resolution:** This section will include a mechanism for resolution of disputes in the interpretation and implementation of this Agreement. The first level of resolution will be through discussion at the Main Table. To be clear, this form of dispute resolution is distinct from the tools that may be available for resolution of disputes between the Crown and Indigenous nations, such as some of those outlined in the Agreement (e.g. panel of Arbitrators).

8. **Assessment:** The Parties will review and assess the implementation of the Act and Agreement every 12 months, the process details to be worked out through negotiation.

III. Engaging Canada

- The Parties will engage Canada to contribute to the costs of building capacity, funding new institutions, and for other subjects which require their participation for relationship building to occur, to achieve reconciliation.

- As part of this engagement, the Province agrees to work collaboratively with Indigenous nations to align treaty and other negotiation mandates to be consistent with the recognition principles set out in this *Act* and Agreement, international standards, and the evolving jurisprudence.