

Discussion Paper on Instructions for Implementing the New Relationship

Context

In 2005 the Province and the First Nations Leadership Council entered into a New Relationship based on respect, recognition and accommodation of aboriginal title and rights; respect for each others respective laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions. The parties agreed to establish new processes and institutions for shared decision-making regarding land and resources and for revenue and benefit sharing.

The Parties wish to further implement the commitments of the New Relationship. This will be accomplished through the enactment of a legislative package which includes the development of regulations, template shared decision-making and revenue and benefit sharing agreements and the issuance of a Proclamation.

The parties propose to move forward on the following basis:

Legislation

The Province will enact legislation consisting of the following elements:

Purpose

The purpose of the legislation will be to:

- recognize that Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder, without requirement of proof or strength of claim;
- enable and guide the establishment of mechanisms for shared decision-making in regard to planning, management and tenuring decisions over lands and resources;
- enable and guide the completion of revenue and benefit sharing agreements between Indigenous Nations and the Province;
- set out a vision of re-building Indigenous Nations and establish a new institution to support and facilitate the process;
- establish processes, mechanisms or a new institution to assist in resolving any disputes than may arise regarding the interpretation or implementation of the legislation, regulations or any agreements concluded pursuant to the legislation.

Implementation of the Act is intended to foster reconciliation, cooperation and partnership and contribute to certainty for Indigenous Nations and third parties.

Scope

The Act will apply to all ministries and provincial agencies, in particular those that have any direct or indirect role in the management of lands and resources in the province and will take priority over all other provincial statutes dealing with these subject matters.

The Act would make clear that:

- constitutional and common law of Aboriginal rights and title and treaty rights, including available remedies, are unaffected by the Act.
- the Act is not intended to affect the status of existing provincial crown granted interests or tenures in land or resources, including fee simple title;
- nothing in the Act creates any new constitutional rights or law-making authority; and
- nothing in the Act alters, or can be interpreted to alter, either negatively or positively, the federal and provincial division of powers or the jurisdiction of either the Province of British Columbia or any Indigenous Nation under the Constitution of Canada.

Recognition Principles

The Province would adopt as a guiding standard for all of its conduct and negotiations with Indigenous Nations, including the creation and implementation of all enactments, policies and mandates affecting lands and resources, the following recognition principles:

- That Indigenous Nations and peoples pre-existed and continue to exist today and have their own laws, governments, political structures, territories and rights inherited from their ancestors. The Crown recognizes this without requirement of proof;
- That Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder. The Crown recognizes and affirms this without requirement of proof or strength of claim;
- That Crown title exists with Aboriginal title throughout British Columbia;
- That both Aboriginal and Crown title come with obligations and responsibilities;
- That Aboriginal title is a pre-existing interest in land, is held collectively and includes a jurisdictional and economic component;
- That there are existing treaty rights that exist in British Columbia and these must be honourably implemented; and
- That the relationship between Indigenous Nations and the Crown is a government-to-government relationship in which both parties exercise authority to make decisions including about how the lands and resources will be used and the resources shared.

Indigenous Nation-Rebuilding

The reconstitution of Indigenous Nations and the identification of the proper title and rights holders are keys to achieving certainty and the effective functioning of the framework for shared decision-making and revenue and benefit sharing contemplated by this Act. In the Tsilhqot'in decision, the Court identified the proper title and rights holder by reference to the four common threads of language, customs, traditions and shared history. In that case, the proper title and rights holder was the Tsilhqot'in Nation and not an Indian Band. Where the proper title and rights holders of an Indigenous Nation are represented by one political structure with a mandate to enter into shared decision-making and revenue and benefit sharing agreements with the Crown, the Indigenous Nation will be considered to be reconstituted for the purposes of this Act.

The Act will support and facilitate the reconstitution of Indigenous Nations by providing for the establishment of an Indigenous Nation Commission.

Indigenous Nation Commission

The legislation will establish the Indigenous Nation Commission, developed collaboratively with the First Nations Leadership Council.

The Commission will facilitate the identification, formation or reconstitution of the political structures of Indigenous Nations and confirm that such political structures have mandates from the proper title and rights holders to enter into shared decision-making and revenue and benefit sharing agreements with the Crown. The Commission could also work with Indigenous Nations to resolve issues of overlaps and shared territories.

Shared Decision-Making and Revenue and Benefit Sharing

The Act would enable three levels of engagement between the Province and Indigenous or First Nations: Comprehensive, Interim, and Default. The three levels would have different elements in terms of: statutory triggers, forms of Indigenous Nation building, shared decision-making outcomes and revenue-sharing outcomes.

(a) Comprehensive

The Comprehensive Level of engagement would involve the comprehensive application of recognition principles through shared decision-making and revenue-sharing agreements throughout an Indigenous Nation's territory. Engagement at the comprehensive level would be triggered by reconstitution of an Indigenous Nation and put into effect by agreements respecting planning, management, tenuring and revenue and benefit sharing.

The purpose of the agreements would be to achieve the harmonization of Crown and Indigenous Nation processes and decisions. Agreements will be based on templates/models to be adopted by regulation and collaboratively developed.

(b) Interim

Prior to comprehensive agreements being in place with an Indigenous Nation, the Interim level of engagement would involve the application of the recognition principles through shared decision-making and revenue-sharing agreements to certain specified categories of development projects and defined "strategic decisions". The categories of decisions which will trigger this level of engagement will be agreed upon by the First Nations Leadership Council and the Province, and listed in regulation. The agreements will be guided by the principle that processes and mechanisms for making decisions will be designed to accommodate and not compromise the interests of the parties.

At the interim level statutory decision makers will be enabled to exercise their discretion in accordance with agreements with an Indigenous Nation.

The Province is committed to revenue-sharing for sharing portions of provincial revenues related only to the specific projects or decision.

(c) Default

The Default Level would apply in all other cases where the courts would now apply honour of the crown principles. In this level the Province would engage on the basis of a consistent cross government approach to the application of the recognition principles respecting Aboriginal rights and title and treaty rights. The objective is a clear improvement in the status quo.

A Policy Framework would be jointly developed with FNLC representatives. The Framework would prescribe how provincial engagement would focus on analyzing impacts on aboriginal rights and title and treaty rights, and not on the strength of rights or title claims.

Enabling Statutory Decision Makers to Honour the Engagement Principles

Notwithstanding any other enactment, statutory decision makers can enter into agreements or take any actions to give effect to the recognition principles in making agreements and acting within agreements. Statutory decision-makers may enter into agreements with other statutory decision-makers who have authority respecting related subject matters connected to a land or resource development so that the decision-makers can together carry out a unified decision-making process with, or enter into a decision-making agreement with, an Indigenous Nation or other First Nation entity respecting the matters.

Council of Indigenous Nations

The BC Constitution Act will be amended to enable the Lieutenant Governor in Council to create a Council of Indigenous Nations. The Council of Indigenous Nations would have a mandate agreed by the FNLC and the Executive Council and implemented by regulation. The Council of Indigenous Nations would be comprised of leaders of reconstituted Indigenous Nations and initially may include representatives of the member political organizations of the First Nations Leadership Council.

Dispute Resolution

The legislation would enable dispute resolution. Dispute resolution processes should reflect the mutual expectation that most disagreements would be resolved through informal or political discussions. In the event that formal mechanisms are required the parties should undertake a graduated approach from local to more senior levels of authority until resolution is achieved. Mediation of a dispute arising from the interpretation and implementation of the Act, any regulations or agreement made hereunder may be undertaken, including establishing a tribunal for such purposes.

Proclamation

A Proclamation will be issued that speaks to the history of the Province of British Columbia, from pre-contact times through to the implementation of colonial policies that have had longstanding negative impacts and have served to create adversarial provincial Crown-Indigenous Nation relations.

The Proclamation would describe how we are at a point in our collective history where there is huge opportunity to turn the page of history and establish a new relationship of respect and recognition.

The Proclamation would serve to set out a joint vision of the future and future Crown-Indigenous Nations relations. As well, it would envision the rebuilding of Indigenous Nations as a key part of the decolonization process, and as a necessary element of improving Crown-Indigenous Nation relations. Appended to the proclamation would be a listing and description of key historical events. (An attached map portrays the Indigenous Nations of British Columbia.)

The Proclamation should be eloquent and poetic. It should serve the purposes of fostering reconciliation and educating the broader population.

Ratification of Instructions

This Discussion Paper on Instructions for Implementing the New Relationship is the result of work undertaken by representatives of First Nations political organizations and senior representatives of the Government of British Columbia. The two parties must now take it to their Principals for review and consideration.



Confidential – without prejudice

2/19/2009 / 5:46:33 PM