

First Nation Consultation and Accommodation: A Business Perspective

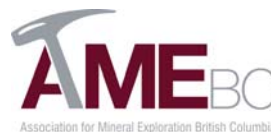
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**BC Utilities
Advisory Council**



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A BUSINESS PERSPECTIVE**

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FIRST NATION CONSULTATION AND ACCOMMODATION: A BUSINESS PERSPECTIVE

EXECUTIVE SUMMARY

The business community in British Columbia supports the development of a New Relationship between First Nations and the Government of British Columbia. Many aspects of the New Relationship are of interest to the business community. This paper focuses on Consultation and Accommodation. Many industries in British Columbia are experiencing a great deal of frustration at the pace, content and lack of clarity of the First Nation consultation processes. Also missing is a cohesive vision on how best to implement court rulings on consultation and accommodation in a meaningful and practical way.

The Government of British Columbia and the First Nations Leadership Council – collectively known as the “New Relationship Management Committee” – invited the business community to offer its thoughts and recommendations on how the new Consultation and Accommodation regime might be structured. Major business and industry associations formed the “New Relationship Business Group” to answer this challenge.

We offer this paper as our perspective on Consultation and Accommodation. We intend this to be the beginning of positive, constructive discussions that will lead to a new regime that meets the expectations of the law and is effective and efficient in implementation, while balancing First Nation and Crown interests. We do not presume that we have all the answers, but we do feel that our analysis and recommendations will contribute to the discussion that needs to be undertaken. We very much look forward to that discussion.

Perhaps the most succinct and direct explanation of the law surrounding First Nation consultation is found in the ruling of the Supreme Court of Canada in *Haida*:¹

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The New Relationship Business Group encourages First Nations and the Government of British Columbia to undertake action in the following priority areas:

- A new model for First Nation Consultation and Accommodation that considers both dimensions of the content of the duty to consult:
 1. the presence and degree of First Nation interest in the lands and resources at issue; and
 2. the potential of a project or activity to negatively affect those First Nation interests.

- ❑ A new government policy that clearly sets out the expectations, time frames and process for First Nation Consultation and Accommodation, including recognition that agreements between government and First Nations are to be encouraged.
- ❑ Recognition that the responsibility for an effective process is shared by government and First Nations, such that both parties must participate in good faith in reaching consensus.
- ❑ Consultation on higher level plans is preferred to engagement on each and every minor permit.
- ❑ Acceptance that there are outstanding issues in the reconciliation of aboriginal and Crown titles that cannot be resolved through consultations on proposed development activities. Debating those issues in project consultations does not lead to their resolution and only diverts attention from the applications at hand.

In Part 3, we offer the New Relationship Management Committee two options for the implementation of a new regime: implementation through policy using existing government mechanisms; or policy changes plus the creation of an independent office to oversee the consultation process.

As we noted at the outset and is thematic throughout this paper, the New Relationship Business Group will be pleased to work hand in hand with First Nations and the Government of British Columbia in cooperatively seeking durable solutions to the issues relating to First Nation Consultation and Accommodation.

The New Relationship Business Group urges the Government of British Columbia and the First Nations Leadership Council to urgently engage on reaching a timely resolution of the Consultation and Accommodation issue. It has been over 18 months since the New Relationship promised to “establish effective procedures for consultation and accommodation”. The lack of policy direction and shared vision is frustrating government officials, First Nations and industry.

It is our hope is that this paper assists in achieving the promise of the New Relationship. We are happy to help government and First Nations work through and reach consensus on this important issue.

PART 1. THE CONSULTATION CONTEXT

Introduction

The release of “The New Relationship” by the Government of British Columbia and the First Nations Leadership Council in the Spring of 2005 attracted a great deal of attention from the British Columbia business community. The business community in British Columbia is very interested in and supports the New Relationship. It is a bold initiative of government and First Nations to reconcile Crown and aboriginal titles cooperatively while building a positive, mutually-beneficial and lasting relationship; a relationship based on trust, respect and a shared vision. As the Supreme Court of Canada so wisely observed, “We are all here to stay”.

Over the next several months there were a number of meetings of government and First Nations leaders – through the New Relationship Management Committee – with business leaders. During that time the Business Council of British Columbia facilitated the creation of the “New Relationship Business Group” comprised of:

- ❑ Association of Mineral Exploration BC
- ❑ BC Chamber of Commerce
- ❑ BC Roadbuilders and Heavy Construction Association
- ❑ BC Salmon Farmers Association
- ❑ BC Utilities Advisory Council
- ❑ Business Council of BC
- ❑ Coast Forest Products Association
- ❑ Council of Forest Industries
- ❑ Council of Tourism Associations of BC
- ❑ Mining Association of BC

The Group engaged Strategic Aboriginal Consulting Inc. to develop a common business perspective on the New Relationship. In this paper the New Relationship Business Group provides its perspective on First Nation Consultation and Accommodation.

This paper concentrates on matters relating to provincial jurisdiction, which govern most of the lands and resources in British Columbia. For this reason and because the New Relationship is an initiative of First Nations and the provincial government in which the federal government is not a formal participant, we have not included a discussion of federal matters. Nevertheless, the New Relationship Business Group encourages the Government of Canada to review and carefully consider our thoughts and recommendations.

The Importance of First Nation Consultation and Accommodation to Business

This is an exciting time in the BC economy. The investment climate is strong and there is near full employment, attracting more resourced-based industry to this province. The New Relationship Business Group is committed to explore opportunities that support a strong economy to sustain and improve the quality of life of all British Columbians, including First Nations.

Recent court decisions have made it abundantly clear that the obligation to consult First Nations about activities that may affect their asserted aboriginal rights and aboriginal

titles rests entirely with the Crown. There is no legal obligation on private businesses or other third parties to consult First Nations on proposed or planned developments. The question may be asked, "Why does the business community care about how the Crown undertakes its obligation?" The answers are both simple and complex.

The simple answer is that businesses must await the completion of Crown consultations with First Nations before development applications to the Crown can be approved. The BC government has estimated that there are some 200,000 decisions taken each year that attract the obligation to consult First Nations. The timeliness and appropriate degree of consultation is therefore of great interest to business.

To fully discuss the more complex answer would occupy a complete paper itself. However, some of the challenges posed to business by First Nation consultation include:

- ❑ First Nations assert rights in the lands and resources that are also the cornerstone of economic development in BC. Identifying those interests and determining how best to address them is a major issue affecting economic development.
- ❑ It seems that in the absence of a consensus or policy on consultation and accommodation, government is taking a very risk adverse approach. That is, in order to ensure that consultation does not fall short of what the courts might require government is requiring full consultation on virtually every decision, no matter how minor or routine.
- ❑ The BC government has a 2002 First Nation Consultation Policy, but it has not been updated or adapted to bring it squarely in line with current and emerging jurisprudence, or the spirit of the New Relationship.
- ❑ Many industries require permits, licenses, tenures or other approvals from a variety of line ministries. Each ministry having differing approaches to First Nation consultation increases company workloads and resources expended and unnecessarily frustrates resource development activities.
- ❑ In many cases the scope of consultation is not properly reconciled with the scope of administrative and contractual decisions.
- ❑ BC is home to some 200 First Nations with a wide range of defined and asserted First Nation rights, titles and interests due to historic treaties, modern treaties (e.g., Nisga'a) and differing land and resource uses and occupations. Properly dealing with these asserted rights, titles and interests is difficult without a shared understanding of them.
- ❑ First Nations face a growing demand on their scarce resources. Few are able to dedicate sufficient resources to priority areas.
- ❑ In the absence of the reconciliation of aboriginal and Crown titles through treaties, consultation and accommodation discussions have become negotiations over who owns the land and who can make decisions about its use. Too often consultations on projects and activities become mini-treaty negotiations.

And, perhaps most importantly, the provincial government and First Nations leadership have recognized the important role that the business community can play in the New

Relationship and have invited us to provide our best advice. We are extremely happy to do so.

The New Relationship Business Group urges the Government of British Columbia and the First Nations Leadership Council to urgently engage on reaching a timely resolution of the Consultation and Accommodation issue. It has been over 18 months since the New Relationship promised to “establish effective procedures for consultation and accommodation”. The lack of policy direction and shared vision is frustrating government officials, First Nations and industry.

It is our hope is that this paper assists in achieving the promise of the New Relationship. We are happy to help government and First Nations work through and reach consensus on this important issue.

Additional Background

In June 2004, the Business Council of British Columbia released its paper, “The British Columbia Treaty Process: A Road Map for Further Progress”. It was aimed at introducing ideas to help improve the BC treaty process and achieve lasting settlements sooner and with greater certainty for all parties. The Business Council recognized that in order to build lasting treaties and to provide what was termed “interim predictability” while these very complex treaties were being negotiated there had to be changes to the Consultation and Accommodation regime. Of the 26 recommendations in that paper three related specifically to Consultation and Accommodation:

1. The Governments of British Columbia and Canada should engage First Nations, the BC Treaty Commission and the Business Council in developing a new, practical and common approach to First Nation consultation and accommodation.
2. The workable approach to First Nation consultation and accommodation should establish a clear mechanism with timelines, financial obligations and outcome expectations.
3. An “Aboriginal Consultation and Accommodation Panel” should be created to facilitate this matter.

And, Recommendation #22 also spoke to interim predictability:

22. The Principals [Canada, BC and the First Nations Summit] should consider how to improve the climate for business development and investment while treaty negotiations are underway. The Business Council is prepared to engage in a discussion with the Principals in the near term to find ways to accomplish this.

Unfortunately, there was little engagement on the Business Council’s advice and recommendations.

However, with the Supreme Court of Canada decisions in *Haida* and *Taku River Tlingit* later that same year and the announcement of the New Relationship in the Spring of 2005, the business community was again invited to engage with government and First Nations.

Businesses in British Columbia believe that we have a key role in furthering the New Relationship. First Nations are our neighbours, our employees, our contractors and our investors and act as our landlords for on reserve activities.

At the same time, our operations are generally undertaken with permits, licenses and tenures issued by government – mainly, the provincial government. Most of what we do attracts a regulator in some manner. We want to ensure that both government and First Nations are properly engaged and functioning effectively together. A First Nation consultation process that does not work imposes a huge cost on industry.

A Word About Aboriginal Rights and Title

According to the Supreme Court of Canada in *Haida*, the duty of the Crown to consult First Nations

... arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.²

Clearly the underlying rationale for government to consult First Nations on proposed activities on Crown land is because the proposed activity may have an impact on the exercise of an aboriginal right or title recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Unfortunately there is no common understanding of section 35 aboriginal rights in Canada or how those rights may be adversely affected by the broad range of resource development activities. Attempting to discover what those rights are in specific circumstances and geographic areas would require a great deal of investment of time and money by government and First Nations (and, likely, the project proponents). And, such a process is still unlikely to result in a common, agreed understanding. We would, in effect, have to undertake court cases or mini treaty negotiations before even the most insignificant of applications could be approved by the Crown. We speak more about this topic below and offer a recommendation.

In view of these complexities, we speak in this paper about “First Nation interests” we are speaking of those interests triggering the Crown’s obligation to consult. Interests need to be demonstrated but not proven as existing aboriginal rights or titles for the purposes of engaging in a constructive dialogue with the Crown about a development application.

PART 2. THE BUSINESS PERSPECTIVE

A. Priority Recommendations

In an effort to assist government and First Nations to take early action in priority areas we have divided our recommendations into “Priority” and “Secondary” sections. We believe that all these recommendations are important to a viable consultation regime, but would like to see action taken on the priority recommendations in the near term.

First Nation Consultation Intensity

The depth of consultation to be undertaken must relate to the strength of the claim and the potential for infringement. As the Supreme Court of Canada noted in *Haida*:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. ... At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. ... Between these two extremes of the spectrum just described, will lie other situations.

And, to this telling statement about the strength of First Nation interests must be added the impact of the decision being taken by government. That is, does the project or activity have an impact on the lands and resources in which the First Nation may assert interests? If so, what is the degree of impact on the lands and resources?

Therefore, the appropriate questions are: What is the First Nation interest in the lands and resources and what impact will the project or activity have on those lands and resources?

We have captured these two dimensions in a detailed “First Nation Consultation Intensity Matrix” found in Appendix 1 of this paper. Appendix 2 sets out working definitions of the concepts set out in the matrix.

The matrix is somewhat similar to that contained in the Upper Similkameen Indian Band/Ministry of Energy, Mines and Petroleum Resources Protocol Agreement referenced below, but it is designed to act as a more general template for all line ministry First Nation consultation activities. We believe that a full discussion of this matrix and its adoption will lead to a more regularized and predictable consultation environment.

APPENDIX 1		First Nation Consultation Intensity Matrix					
	Major Disturbance	No Notification	Moderate Consultations	Intensive Consultations	Intensive Consultations	Intensive Consultations	In Accordance with Treaty Provisions
Activity	Large Project or Large Area	No Notification	Limited Consultations	Moderate Consultations	Moderate Consultations	Intensive Consultations	In Accordance with Treaty Provisions
or	Small Project or Small Area	No Notification	Limited Consultations	Moderate Consultations	Moderate Consultations	Intensive Consultations	In Accordance with Treaty Provisions
Project	Previously Disturbed Area	No Notification	Information sharing	Limited Consultations	Limited Consultations	Moderate Consultations	In Accordance with Treaty Provisions
	Ancillary Permit, License or Tenure	No Notification	Notification	Notification	Notification	Limited Consultations	In Accordance with Treaty Provisions
	No Demonstrated Impact	No Notification	Notification	Notification	Notification	Notification	In Accordance with Treaty Provisions
		No Interests	Occasional Use	Economic Use or Opportunities	Intensive Use	Intensive Use and Advanced Treaty Negotiations	Established Treaty Right or Title
				First Nation Interests			

Recommendation #1. The New Relationship Management Committee should review the “First Nation Consultation Intensity Matrix” with the business community with a view to adopting it for application in British Columbia.

This recommendation should be implemented immediately while the other recommendations are being considered.

Agreements Are Paramount

The Crown possesses the duty to develop, publish, follow and enforce a policy on First Nation Consultation. Government would be wise to engage First Nations in the development of such a policy, as is contemplated in the New Relationship discussions currently underway. Ideally, government and First Nations (and, we would hope, the business community) would agree on the new consultation regime. However, if after reasonable efforts have been undertaken to reach a consensus there remains no agreement the government still has the ability and duty to establish a policy.

We still would hope that consensus would be the norm. To that end, we are encouraged by processes that have been agreed upon, such as the Mining and Minerals Protocol Agreement between the Upper Similkameen Indian Band and the Ministry of Energy, Mines and Petroleum Resources. The business community encourages such

agreements and recommends that where such consensus has been reached it would be paramount to any First Nation Consultation Policy or process that will be established.

Moreover, there may be instances where a regulatory regime is in place, or may be put in place, to deal with sectoral engagement with First Nations. This is the case with the oil and gas industry and the Oil and Gas Commission. Such regimes, in our view, would also remain in place to govern First Nation consultation activities. They would have paramountcy over new consultation structures that might be put in place.

Recommendation #2. Where existing agreements on First Nation Consultation are in place between a First Nation or First Nation organization and government they will be paramount to any new processes or policies.

This recommendation should be implemented immediately while the other recommendations are being considered.

Consultation Timeliness and Completion

Engaging First Nations in discussions about proposed projects is very important. There must be, however, reasonable timeframes for these discussions. The timeframes should be set and reviewed as experience dictates.

Hand in hand with timeframes, there must be the ability to determine when consultation has been completed and a decision on the proposed activity can be taken. Situations have and will again arise where government and a First Nation disagree that satisfactory consultation has been undertaken. There must be a mechanism to authoritatively resolve such disagreements short of appeals to the court.

We wish to be clear, however, that we are **not** suggesting that the statutory or regulatory ability of line ministries or other bodies to take decisions be given to another agency. Rather, we are recommending that a mechanism be established that can determine when the consultation obligations of the parties have been reasonably satisfied. At that point, the statutory decision-makers can determine the disposition of the application(s) before them on their merits with the comfort that consultation obligations have been met.

Recommendation #3. Timeframes for First Nation consultation should be set and a mechanism established to mediate disputes about the meeting of consultation requirements, arbitration of such disputes and to confirm that consultation obligations have been met.

First Nation Participation

First Nations also have an obligation to participate in consultation activities. The New Relationship Business Group hopes that our recommendations encourage and support First Nation participation while also making their participation less onerous and more affordable.

There may be situations where a First Nation may not wish to engage in consultations. While this would be unfortunate and every reasonable effort should be made to encourage their participation, First Nation refusal to engage should not jeopardize the proposed project. That is, government should continue to provide information and seek opportunities to discuss the proposal with the First Nation, but should be prepared to determine that the consultation process has been completed thus enabling the appropriate line ministries to take decisions on the merits of the proposals before them.

Recommendation #4. First Nation refusal to engage in consultation should not be a reason to delay a decision on a project, as long as reasonable steps have been taken to secure First Nation engagement.

First Nation Funding

The scarce resources of First Nations are continually being called upon to engage in consultation activities and related meetings and discussions. Sometimes funding for First Nation participation is provided by the Crown; sometimes it is provided by the First Nation out of its own sources; and sometimes the proponent company is called upon to provide funding to the First Nation. There has to be more rigor and greater predictability to the resources to be provided to First Nations for consultation activities. And, given that the obligation to consult First Nations rests with the Crown, it is the Crown that must provide these resources to First Nations.

Recommendation #5. The Crown should establish a funding mechanism to provide First Nations with the resources necessary to properly engage in consultation and related activities.

A Higher Level of Consultation

Some of the approximately 200,000 decisions made annually by the BC government that might attract a First Nation consultation obligation relate to approvals in furtherance of a broader plan, strategy or project where the larger activity has already been the subject of First Nations engagement. Once consultation on a plan or strategy has been completed further consultation on permits, licenses and tenures will be deemed to have been

completed, as long as those were contemplated in the original plan or strategy. For example, once consultation has been completed on a Forest Stewardship Plan and that plan is approved, consultation on activities under that FSP (such as Cutting Permits and Road Permits) would not be required.

Recommendation #6. Consultation should be undertaken at the plan or project level and completion of that consultation will also be completion of consultation on any approvals contemplated by the plan or project.

Not Try to Resolve the Bigger Issues

Many issues remain unresolved on the BC “Land Question”, as it has often been called. The business community supports the resolution of these questions through honourable government to government negotiations. There is no quick fix to the outstanding treaty matters, but we acknowledge that progress is being made and are particularly encouraged by the “handshake deals” that have been reported at some tables.

Until the questions about aboriginal rights and title and their interaction with Crown rights and title are resolved, however, business continues to operate in an uncertain climate. It is important that the Crown and First Nations do not attempt to resolve these complex rights and titles issues while engaging in consultations over, say, a water license application. Instead, the parties should concentrate on the likely impact of the proposed activity on the interests and activities of the appropriate First Nations. Arguments over who owns the land and who can make the rules governing it are not appropriate to a First Nation Consultation process and best left to the forum created for that discussion.

Recommendation #7. Consultations should not debate or attempt to resolve the existence, extent or limitations of Crown and aboriginal rights and titles.

B. Secondary Recommendations

First Nation Traditional Territories

Descriptions of the asserted traditional territories of all First Nations with interests in BC should be available, ideally in one place. The BC Treaty Commission compiles the traditional territories of First Nations who have set them out as part of their Statements of Intent. However, about one in three BC-based First Nations are not in the treaty process so the Treaty Commission would not have descriptions of their traditional territories on file.

Some First Nations have published their traditional territories; some even make it available on the Internet; and some will provide the developer with that information upon request. Some, however, are very reluctant to provide this important information.

We would also encourage First Nations to set out areas of key interest within their traditional territories. For example, if a developer views a map of an area in which they may wish to make an application and discovers that a First Nation has noted a spiritual site it would help the developer make a determination whether to continue to pursue that area or to explore other options.

We appreciate that some of this key information is very closely held by First Nations for cultural preservation, to ensure that spiritual areas remain and to protect legal and negotiating positions. It is nevertheless worth exploring mechanisms that could be developed to meet the interests of both First Nations and the business community.

Recommendation #8. First Nations should set out areas of key interest within their traditional territories and a process should be developed for sharing this information.

Information Sharing

At a minimum, consultation requires that information held by parties that is pertinent to the approval(s) being sought be shared so that the parties can be aware of potential impacts on the one hand and First Nation activities and interests on the other. Unfortunately, information is sometimes not shared or only a small portion of the available information is shared. This can be based on a fear that certain relevant information could be misused, made public or used in court actions either relevant to the current proposed project or even in rights and titles cases. This fear unduly hampers reasonable consultation.

Some of the recommendations in this paper will reduce the costs of First Nation consultations, while preserving and improving their integrity. For example, there have been numerous studies undertaken on traditional uses, biophysical analyses and other studies. Where previous studies have been undertaken and relate to a new proposal those studies should be used – perhaps updated – rather than doing essentially the same study over again.

All such studies undertaken should be compiled by the provincial government under very stringent guidelines to ensure that the information is not inappropriately released or misused. This will probably require the development of legislation and regulations. However, the benefits of having those studies available and saving the time and effort of repeating them – or essentially repeating them – are worth the investment at the front end. We believe that the confidentiality provisions covering the BC Office of the Information and Privacy Commissioner³ could be adapted to this purpose.

Recommendation #9. The New Relationship Management Committee should develop a mechanism for the compilation, protection and appropriate dissemination of information, studies and research undertaken relating to First Nation land and resources uses.

Skilled Mediators

Occasions arise where government, First Nations and proponent companies simply do not agree. Whether the matter eluding agreement is a major one or a seemingly minor one is irrelevant. Any failure to agree will diminish the relationship the parties are attempting to structure and improve. There must be a roster of experienced and skilled mediators who can be called upon to help the parties resolve disagreements.

Recommendation #10. The New Relationship Management Committee should develop a roster of skilled mediators to assist the parties to overcome disagreements about the consultation process.

Provincial Coordination

The provincial government has been having some success with “Front Counter BC” where many different types of land and resource applications can be made through one virtual window. The business community would like to see better coordination of First Nation consultation activities within the provincial government. Front Counter BC begins the “referral” process with First Nations on applications it receives, but we believe that an agency should ensure that all consultations arising from a project’s several applications are coordinated and assisting one another. Common guidance to line ministries is important, but it is crucial that efficiencies are exploited and that all appropriate consultative steps are undertaken.

Recommendation #11. First Nation consultation activities within the provincial government should be better coordinated to avoid duplication and conflicting policy guidance. All consultation activities should be as streamlined as possible.

Accommodation

Accommodation of First Nation interests can be an outcome of a consultation process. It is solely the obligation of the Crown and does not flow through to project proponents.

Nevertheless, project proponents have a vital role to play in the discussions between First Nations and government leading up to accommodation. For example, during the course of consultations a developer could volunteer to adjust the project to avoid interference with a First Nation activity or to minimize such interference so that the practice will be preserved. The costs of such voluntary action would be borne by the proponent. However, in some cases the Crown might direct the proponent to make adjustments to its project to accommodate First Nation interests. In these instances the costs of directed accommodation should be borne by the Crown.

Once consultations on a project are complete there may remain outstanding accommodation issues between the Crown and the First Nation. It should be possible in many instances for the Crown to provide the requested approvals for the project while the accommodation negotiations continue, especially where the accommodation is the payment of funds to a First Nation. Through the completed consultation process the Crown and the proponent would be fully aware of the interests of the First Nation, so the project ought to be able to begin development and even operation while the Crown and the First Nation finalize accommodation negotiations.

Recommendation #12. Unresolved accommodation negotiations between a First Nation and the Crown should not delay a government decision on an application for a permit, license or tenure.

PART 3. THE CONSULTATION MECHANISM

As we noted at the outset of this paper, in 2004 the Business Council recommended the creation of a “Panel” to oversee the First Nation Consultation process. That option continues to resonate for many members of the New Relationship Business Group. We have refined this thinking and recommend that the following be considered.

The New Relationship Business Group appreciates that it will take some time for the New Relationship Management Committee to review, modify and implement the foregoing twelve recommendations. Of course, we are prepared to participate in helping the Management Committee better understand these recommendations and assist them in working through the implications and impacts of what we are suggesting, as well as discuss ideas and recommendations that the Province and First Nations might propose.

The current situation cannot remain static, however, while long-term, long-lasting solutions are being developed. Pre-implementation of some of these recommendations can be undertaken in the near term. Or, some of them can be field tested through pilot projects.

Irrespective of this, Recommendations #1 and #2 – the First Nation Consultation Intensity Matrix – should be implemented immediately. And, as noted earlier in this paper, where there are existing First Nation consultations mechanisms operating, for example, through the Oil and Gas Commission, these mechanisms would remain in place.

There are two options for proceeding, which could also be undertaken sequentially.

Option 1. Implementation of the Matrix

The Matrix could be implemented very quickly with the appointment of an agreed independent person who would make binding determinations on where a particular proposed activity falls on the Matrix. The parties to the consultation would then develop a workplan and process to meet that direction.

Hand in hand with this option would be for the Government of British Columbia to update its 2002 First Nation Consultation Policy to bring it into line with more recent court rulings and direction. The Supreme Court of Canada acknowledged the ability of the Province to establish its 2002 policy, so the simplest option is for that policy to be brought into line with the current law and include – at minimum – the First Nation Consultation Intensity Matrix.

Strong leadership by the Government of British Columbia will be required to make the necessary policy changes, implement the matrix and ensure that their consistent application throughout all line ministries and agencies. However, the resource-based industries operating in British Columbia require a consistently applied policy in order to reduce frustration levels and encourage investment.

Option 2. Independent Consultation Commissioner

In addition to the implementation of the Matrix and the adjustment of the 2002 provincial policy in Option 1, the Office of the First Nation Consultation Commissioner would be created by provincial legislation and a First Nation Consultation Commissioner would be appointed as an Officer of the Legislature⁴, similar in status to the Information and Privacy Commissioner. There would be a single Consultation Commissioner whose appointment would be discussed with First Nations. While First Nation endorsement of the appointee would be desirable, it would not be necessary.

The Consultation Commissioner would be supported by skilled professional staff – such as the mediators discussed above – as well as the usual administrative and financial support. The powers of the Consultation Commissioner would be set out in legislation and would include:

- ❑ Adherence to the principles of administrative law and natural justice
- ❑ Creation and enforcement of timelines for consultation activities, along the lines of the “First Nation Consultation Intensity Matrix” discussed in this paper.
- ❑ The ability to determine when a consultation process is complete and to direct the appropriate line ministries and agencies to make decisions on related applications on their merit. The Consultation Commissioner would respect the jurisdiction of the appropriate government bodies to take decisions on applications and **would not** have the ability to direct the decision-maker on whether to approve or reject an application. The Consultation Commissioner would merely order that all relevant First Nation information has been received and considered.
- ❑ The provision of mediation services to the consultation process when it is clear to the Consultation Commissioner that the parties cannot overcome disagreements themselves. In addition, the Consultation Commissioner would have the ability to arbitrate disputes over the consultation being undertaken.
- ❑ Compile and retain information on First Nation traditional territories, traditional use studies and other relevant data and create procedures to ensure the protection of that information to participants while permitting the Consultation Commissioner to provide certain elements of the information to facilitate a more effective process.
- ❑ The Consultation Commissioner would not have a role in accommodation discussions between the Crown and First Nations.
- ❑ Oversee applications by First Nations for consultation funding.
- ❑ The Office of the Consultation Commissioner would report directly to the Legislature at least annually.
- ❑ The Office of the Consultation Commissioner would be subject to regular reviews.

The New Relationship Business Group believes that an independent office would provide comfort to all parties that the only agenda of the Consultation Commissioner would be the satisfaction of First Nation consultation requirements. Other strategic or political considerations would not factor into the work of the Consultation Commissioner.

Setting up a new Office would have costs, but we are confident that these new costs would be outweighed by the savings to government, First Nations and industry of a more

predictable, efficient and effective consultation process. There may remain a concern that establishing a new Office would simply increase the bureaucracy and lead to more confusion and inefficiency. However, we have concluded that a properly mandated Consultation Commissioner would not interfere with normal government decision-making processes and would help make one major element of them – First Nation Consultation – more efficient and effective. We reiterate that where a process has been agreed to and put in place – such as the Oil and Gas Commission process – it would have paramountcy over the jurisdiction of the Consultation Commissioner.

CONCLUSION

We stated this at the outset of this paper, but it is worthwhile to repeat that all of these recommendations should be discussed with First Nations and any actions taken should ideally be supported by them. Government and First Nations working hand in hand is the tone of the New Relationship and the New Relationship Business Group supports that approach.

We are happy to offer our thoughts and recommendations on this important issue. We look forward to further discussions leading to a predictable, efficient and effective First Nation Consultation and Accommodation process in British Columbia.

APPENDIX 1

First Nation Consultation Intensity Matrix

Activity or Project	Major Disturbance	No Notification	Moderate Consultations	Intensive Consultations	Intensive Consultations	Intensive Consultations	In Accordance with Treaty Provisions
	Large Project or Large Area	No Notification	Limited Consultations	Moderate Consultations	Moderate Consultations	Intensive Consultations	In Accordance with Treaty Provisions
	Small Project or Small Area	No Notification	Limited Consultations	Moderate Consultations	Moderate Consultations	Intensive Consultations	In Accordance with Treaty Provisions
	Previously Disturbed Area	No Notification	Information sharing	Limited Consultations	Limited Consultations	Moderate Consultations	In Accordance with Treaty Provisions
	Ancillary Permit, License or Tenure	No Notification	Notification	Notification	Notification	Limited Consultations	In Accordance with Treaty Provisions
	No Demonstrated Impact	No Notification	Notification	Notification	Notification	Notification	In Accordance with Treaty Provisions
		No Interests	Occasional Use	Economic Use or Opportunities	Intensive Use	Intensive Use and Advanced Treaty Negotiations	Established Treaty Right or Title
First Nation Interests							

Appendix 2: First Nation Intensity Matrix Concept Definitions

CONCEPT	DEFINITION
Project or Activity	
No Demonstrated Impact	The proposed project does not affect lands and resources.
Ancillary Permit, License or Tenure	An authorization that is included in consultations on larger or broader activities. For example, a Cutting Permit that was contemplated in consultations on a Forest Development Plan.
Previously Disturbed	A project that will affect lands that have been disturbed by previous activities that would have rendered the First Nation interest unexercisable.
Small Project or Small Area	A project limited in scope or affecting a relatively small geographic zone.
Large Project or Large Area	A project that impacts a large area or has impacts across several biophysical categories.
Major Disturbance	A project that will virtually or will completely make the area incompatible with other uses.
First Nation Interests	
No Interests	A First Nation does not use or occupy the affected area.
Occasional Use	A First Nation traditionally used and continues to use the area from time to time, but such use is not incompatible with other uses.
Economic Use or Opportunities	A First Nation traditionally used and area and continues to use or intends to use an area for its own economic development purposes.
Intensive Use	A First Nation traditionally used and continues to use the area intensively or for uses that are incompatible with most other activities.
Intensive Use and Advanced Treaty Negotiations.	A First Nation traditionally used and continues to use the area intensively or for uses that are incompatible with most other activities and the First Nation is engaged in AIP or Final Agreement treaty negotiations.

CONCEPT	DEFINITION
Established Treaty Right or Title	A final treaty is in place and that treaty deals with the lands and resources affected by the proposed project.
Consultation Intensities ⁵	
No Notification	There is no mandated notification of First Nations about the project. However, project/activity proponents may choose to initiate contact with First Nations.
Notification	The First Nation is notified of the project, but First Nation input is not invited. Notification only occurs for those First Nations whose asserted traditional territories include the project area.
Information Sharing	Exchanging information about the proposed activity and First Nation uses that may result in modifications to return or enhance First Nation activities.
Limited Consultations	Engagements of a relatively short term that focus on specified First Nation interests and uses or to a specified limited geographic area.
Moderate Consultations	Consultations that may take three to six months and relate to several First Nation interests and uses/occupations or to a broad geographic area.
Intensive Consultations	Consultations that may take up to a year and relate to multiple First Nation interests and uses/occupations and to a use highly incompatible with other uses.
In Accordance with Treaty Provisions	Treaties should outline how consultations are to be conducted in specified circumstances. Where a treaty is not clear, as would likely be the case for Treaty 8 and the Douglas Treaties, the consultation would be undertaken according to the other categories of the Matrix.

Appendix 3: Summary of Recommendations

Priority Recommendations

1. The New Relationship Management Committee should review the “First Nation Consultation Intensity Matrix” with the business community with a view to adopting it for application in British Columbia. This recommendation should be implemented immediately while the other recommendations are being considered.
2. Where existing agreements on First Nation Consultation are in place between a First Nation or First Nation organization and government they will be paramount to any new processes or policies. This recommendation should be implemented immediately while the other recommendations are being considered.
3. Timeframes for First Nation consultation should be set and a mechanism established to mediate disputes about the meeting of consultation requirements, arbitration of such disputes and to confirm that consultation obligations have been met.
4. First Nation refusal to engage in consultation should not be a reason to delay a decision on a project, as long as reasonable steps have been taken to secure First Nation engagement.
5. The Crown should establish a funding mechanism to provide First Nations with the resources necessary to properly engage in consultation and related activities.
6. Consultation should be undertaken at the plan or project level and completion of that consultation will also be completion of consultation on any approvals contemplated by the plan or project.
7. Consultations should not debate or attempt to resolve the existence, extent or limitations of Crown and aboriginal rights and titles.

Secondary Recommendations

8. First Nations should set out areas of key interest within their traditional territories and a process should be developed for sharing this information.
9. The New Relationship Management Committee should develop a mechanism for the compilation, protection and appropriate dissemination of information, studies and research undertaken relating to First Nation land and resources uses.
10. The New Relationship Management Committee should develop a roster of skilled mediators to assist the parties to overcome disagreements about the consultation process.
11. First Nation consultation activities within the provincial government should be better coordinated to avoid duplication and conflicting policy guidance. All consultation activities should be as streamlined as possible.
12. Unresolved accommodation negotiations between a First Nation and the Crown should not delay a government decision on an application for a permit, license or tenure.

Endnotes

¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 39.

² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 35.

³ Section 47 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, Ch. 165, reads:

Restrictions on disclosure of information by the commissioner and staff

- 47** (1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).
- (2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to
- (a) conduct an investigation, audit or inquiry under this Act, or
 - (b) establish the grounds for findings and recommendations contained in a report under this Act.
- (3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose
- (a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5, or
 - (b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.
- (4) The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.
- (5) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 45.

⁴ We know that this Office would not have the jurisdiction to deal with federal matters. However, we would leave the option open to permit the federal government to opt in to the provincial process. Such cooperative interjurisdictional processes are not uncommon in Canada.

⁵ Note that higher levels of consultations include the lesser levels of engagement. That is, “Limited Consultation” includes “Information Sharing” and “Notification”.