2010 NATIVE AFFAIRS COMMITTEE REPORT - 2009 END OF YEAR

Since last years convention in Fernie we have seen an acceleration of initiatives all aimed to meet the increasing expectations of First Nations. This report will highlight some of them and attempt to outline the general direction of this government in its efforts to keep industry rolling and keep peace on the First Nation front at least until the completion of the Winter Olympic Games in Vancouver. Paying insufficient attention to the needs of the public for access to lands and resources particularly still seems to be the order of the day.

The rise and fall and re-rise of the "Recognition and Reconciliation Act"

At last years convention this subject was quite "fresh". This legislation, if enacted, would have gone where no other Canadian law has gone before. Without consultation with the Federal Government the province was prepared to act contrary to Supreme Court of Canada rulings and recognize a level of aboriginal title without proof or strength of claim. However, for other reasons a very large number of First Nations, contrary to the minds of the FN Leadership Council who were co-authors of the Act, rejected the proposed legislation and it came off the rails; but not completely. All of the principles of the New Relationship have developed further and are being implemented as policy.

The FN proponents of the "Rec and Rec" Act actually were on to something. The whole purpose of the Act was to put in legislation the provisions of the New Relationship. This goal, while not immediately achievable through legislation, is otherwise being equally met through a litany of agreements all intended to address specific demands of First Nations for shared revenues and decision making surrounding land and resource uses.

BC Resource Revenue Sharing Policy

Although announced in October of 2008 this unique policy (the only Province in Canada that has this), in keeping with the New Relationship, had not been totally developed until mid 2009. In general the policy is to provide a process whereby aboriginal groups will receive a negotiated share of Mineral Tax revenue from new mining projects. Since the agreement will be with the Province the development proponents will not be responsible for settling demands by FNs for revenues derived from resources in their territories.

The intention is for the Province to have flexibility to enter directly into agreements with specific FNs on details of sharing royalties. FNs might then have an incentive to see a mine developed quicker since it will result in economic benefit to them once production is attained. The mining industry is generally enthusiastic about the arrangement as it potentially removes a lot of FN opposition. The revenue sharing principle doesn't bother them because, presumably, there is no increase on the Mineral Tax they are paying anyway. Considering the tax revenue over the life of a mine could be well in excess of $100M the benefit to FN communities resulting from this initiative is considerable.

To fully develop the policy the Province has selected four of seventeen proposed metal mines (there are only 11 mines operating in BC) as a pilot project. Negotiators from the First Nations Initiatives Division of the Integrated Land Management Bureau began discussions with the First Nations affected in early 2009 which are expected to result in agreements as a model for other future mining developments.

Of course there are some challenges in determining which FN will be entitled to revenue sharing. Rights and title to the land have not been recognized. "Strength of claim" and

overlapping claims will certainly be major considerations in deciding who gets the revenue stream. The objective of the Province as stated in the New Relationship Document is to "close the social and economic gap" between aboriginal citizens and other British Columbians. This will be the overbearing principle for awarding these shared revenues rather than recognition of entitlement founded in aboriginal title to the lands or resources.

Agreements for sharing revenues and decision making
There are a host of agreements being entered into between the Province and First Nations, far more around shared decision making than revenue sharing. These are in keeping with the New Relationship Document. The roots of this direction can be traced back directly to section 35 of the Canadian Constitution Act. That is where our history witnessed the recognition of two different classes of Canadians. Single agencies, ie MOE, ILMB etc. have been entering into agreements with FNs since around 1993. These agreements are lower level than treaties and do not go near rights and title issues.

Reconciliation Agreements
Any single agency can form a Reconciliation Agreement with FNs although typically the Ministry of Aboriginal Relations and Reconciliation has signed these. These are usually about revenue sharing. Early last December the Province signed the "Coastal Reconciliation Protocol" with six Coastal First Nations (CFN). These are community based agreements meant to provide economic opportunity and other benefits. They provide for $25M for a new ferry terminal at Klemtu, shared decision making on land use ($200 – 600K annually to participate), an alternative energy plan, recreational tenures, forest sector opportunities, and carbon offset sharing.

The carbon offset market for "Carbon Credits" has developed out of international events like the Kyoto Accord. It has been globally accepted that the incremental carbon sequestered within ecosystems such as a temperate rainforests can be measured, evaluated and sold to organizations that are emitting carbon (polluting). The Province and the CFN are to work cooperatively to develop and facilitate a program to share in these future revenues. To appreciate the kind of dollars that could be available here consider that the Saanich School District has a "Carbon Deficit" valued at $80,000 just for 2010. They will have to purchase that amount of "Carbon Credits" every year to redeem their sin of emitting carbon by heating their schoolrooms.

There has been an additional Reconciliation Agreement signed with the Council of the Haida Nation also. In it there is money provided for a massive turnover of forestry tenure to the Haida through purchase, a carbon offset revenue sharing program and the formal adoption of the name of "Haida Gwai" for the existing Queen Charlotte Islands. There are other shared revenue and decision making terms in the agreement also regarding the creation and management of Conservancies.

Collaborative Management Agreements (CMAs)
These are done through MOE and are about developing relationships, shared decision making on lands or resource management and consultation process. These agreements are based on the Province's legal obligations to consult with FNs.

Collaborative Wildlife Management Agreements
The "Wildlife Collaborative Management Agreement" with three Treaty 8 First Nations in the NE corner of BC will be referred to for a summary of concerns regarding this direction in wildlife

management.

In the preamble to this agreement it is acknowledged that, "..Wildlife management is best carried out with the participation of all users of the resource." and "Collaborative Management" means "..Treaty 8 First Nations and British Columbia agree to engage in a Spirit of Shared Decision Making (without changing either parties rights or responsibilities) with the goal of seeking an outcome that accommodates rather than compromises their respective interests."

The "purposes" of the agreement are to recognize Treaty 8 FN priority rights, allow the "meaningful" exercise of those rights, provide for an enhanced role in wildlife management, provide how engagement will occur, and generally outline how the consultative process will unfold. There is to be a "Wildlife Stewardship Board" set up with two representatives each from the Province and the Treaty 8 FN. Considerable details are present in this agreement that call for much social interaction between Ministry and Treaty 8 bureaucracy, culture, event sharing etc. all to bring familiarity, mentoring and other capacity building measures to the Treaty 8 FNs. The intent appears to be, over time, to pass on the monitoring, compliance and enforcement duties of the CO Service to Treaty 8 citizens.

In Region 8 there have been discussions for over three years with members of the Okanagan Nations Alliance for a Collaborative Wildlife Management Agreement. The lead agent from MARR has stated that the main holdup is getting involvement of Regional advisors from the public accepted by the FNs into the process. We are told that beginnings are underway for CMAs for wildlife in the traditional territory of the Kwadacha FN and also the Tahltan. None of these initiatives allow for input from the BCWF into what will result in a decision making body that can have profound effects on the future opportunities of our members and wildlife conservation strategies.

In the case of the CMA with Treaty 8 FNs the Ministry tried very hard to have the provision for a public advisory component as part of the agreement. The FNs would have no part of it as they consider this agreement to be Government to Government and the Ministry finally caved in. This is the same obstruction now being faced in Region 8. The bottom line for FNs seems to be that they don't want a third party involved in their "consultation" process. It would seem that if the Ministry actually values public involvement then it could find a way to separate the wildlife management advisory and FN consultative processes in the implementation of these agreements.

The BCWF must be diligent to put forward our members needs at every opportunity prior to these agreements being struck. Reviewing what has been decided after the fact will not serve the public interest nor foster good relationships with First Nations either.

Strategic Engagement Agreements
The lead agency on these is the Integrated Land Management Bureau (ILMB). These agreements are about land use and, can be quite broad and may involve various Ministries as parties to their development. The focus in these agreements is on the details surrounding consultation. The Province retains ultimate authority on decision making which disallows any "veto" by FNs.

Update on Court Cases
Ahousaht –
On November 3, 2009 BC Supreme Court in Vancouver Madame Justice Nicole Garson brought

forward her decision in the Ahousaht case. The decision dealt with the claim by the Ahousaht Indian Band who asserted they have an aboriginal right to fish commercially for all species in the ocean fronting their territory. Justice Garson's decision accepted that the Ahousaht Band and the other Nuu-chah-nulth Bands did in fact have an aboriginal right to fish all species commercially. This judgment if allowed to stand will place the Indian Commercial fishery on the same priority basis as the current FSC fishery and above the public commercial and recreational fisheries. You can view the reasons for judgment at

http://www.courts.gov.bc.ca/jdb-txt/SC/09/14/2009BCSC1494.htm

It is most peculiar that the evidence presented in Ahousaht was almost identical to that put forward by the Lax Kw'allaams but there the Madame Justice Satanove made a totally contrary decision to that of Garson. Both judges in these different cases were presented with the same findings of the Supreme Court of Canada which has always held that an aboriginal right to commercial fisheries does not exist. Yet the two judges came up with a decision contrary to the other. Subsequent to the Ahousaht decision the Federal Justice Ministry has appealed it.

A major source of concern for us is that in the interim would be if DFO recognizes or allows aboriginal fisheries to enjoy the same priority that Food, Social and Ceremonial fisheries have. Such a turn would have devastating impacts on access to the resource for all sectors.

Lax Kw'allaams - On April 16, 2008 the Honourable Madame Justice Satanove rendered a declaration that denied the Lax Kw'allums Indian Band, largely centered on the Skeena River, their claim to an aboriginal right to harvest on a commercial scale all fisheries resources that they harvest from their claimed territories. I attended the proceedings in the BC Appeals Court on Thursday, Oct. 29 in Vancouver on behalf of the members of the BC Wildlife Federation.

Keith Lowes was our legal representative in the appeal and, in my opinion, did an excellent job. In the customary twenty minutes Mr. Lowes focused on whether the trial judge erred by determining the nature of the fishing by the Lax Kw'allaams to be an "activity" as compared to a "practice." Keith also submitted a very well reasoned Factum on our behalf setting out all the points that support the trial court judges decision.

Fundamentally, Keith argued that the trial judge did not err in judgment, possibly in language, but not in principle. Whether fishing before contact was an "activity" or a "practice" is one of the critical points. For example, cooking is an "activity" but cooking a turkey at Christmas is a "practice". The Lax Kw'allaams argue that all fishing had the status of a "practice" and therefore was integral to their culture etc. The trial judge declared that fishing was an "activity" necessary for survival and the trading of eulachon oil was a "practice". An argument for aboriginal right to trade in eulachon "grease" could be considered but not for fishing generally.

So the issue of an aboriginal right to fish has been seen in past court decisions as species specific, that is, applied specifically to a fishery that was unique, a core activity of the culture and beyond the needs for survival. The Lax Kw'allaams argued that this interpretation was too narrow and that later court decisions had opened this up to make the arguments for an aboriginal right to fish applicable to all fishing activities.

There were about thirty First Nations people present for these Appeal Court proceedings, about twenty of them wearing ceremonial vests with family crests outlined in pearl buttons. I was the only representative from the BCWF.

The Lax Kw'alaams failed for several reasons:

1 – The three Appeals Court judges did not accept that more recent cases, particularly Sappier, substantially modified past Supreme Court of Canada rulings which found an aboriginal right to a commercial fishery did not exist (NTC Smokehouse, VanderPeet:)

2 – Pre-contact trade in eulachon products could not be extrapolated or expanded to provide a basis for an aboriginal right to commercially fish multiple species.

The William case – The importance of the final outcome of this case cannot be stressed enough. The decision by Justice Vickers, now deceased, was rendered in November of 2007 with the major portion of the 473 page judgment being opinion and not binding. The judge dismissed the claim of aboriginal title but rendered the opinion that the Xeni Gwet'in had proven title to about 200,000 hectares of land. There are technical reasons the judge did not go further with a declaration. Since then the Xeni Gwet'in who are a Tsilhqot'in First Nation have been in negotiations with the Province on how to proceed. These negotiations have broken down with the Tsilqot'in sticking adamantly to the claim of aboriginal title to all the lands to which, in Judge Vickers' "opinion", they had proven title. There is another deadline coming up this November when the abeyance of proceedings (the court appeal registered by the Province) will expire.

There is major unrest brewing within the Tsilq0t'in communities over Provincial approval for development of the Prosperity Mine in the Nemiah Valley which is currently awaiting Federal environmental approval. There appears little benefit forthcoming to First Nations from development of this mine because it is an old application and not necessarily subject to the recently developed revenue sharing policy of BC.

The outcome of the William case is of great importance to British Columbians if not all Canadians. At the heart of this case is the question of aboriginal title compared to Crown title and the authority of the Province to grant tenures for resource extraction. The Tsilqot'in have spent over $30 M on this case and feel they have won. The Province has not abandoned totally the option to appeal and gain the certainty that only a Supreme Court of Canada ruling would give. Again, the outcome of this is very significant.

The Yale Treaty

Combining the food and commercial allocations the Yale First Nation are to receive over 2% of the annual Fraser River sockeye plus allocations of other salmon species. "There are ninety eight other First Nations on the Fraser River, most larger in band members, potentially demanding similar or likely larger percentages.

There are FN Bands in the Strait of Georgia, Johnstone Strait, Juan de Fuca Strait and the West Coast of Vancouver Island who also have or are promised a share of the Fraser Sockeye. Historically the commercial and public fisheries have benefitted all Canadians but as these treaties roll out it is clear that eventually the only benefit on the Fraser River will be to First Nations.

Over the years the BCWF has met with Government officials both in BC and Ottawa and on many occasions raised the question of the "arithmetic" regarding these numbers in final agreements with First Nations. It is incredulous that our government leaders don't appear to understand this simple principle and continue to allocate at levels that cannot be maintained if there is to be opportunity for the public and commercial sectors. First Nations themselves will lose out if this insanity continues.

At the time of the signing of the Tsawwassen Final Agreement only five provincial MLAs had

requested briefing notes. It is reasonable to suspect the vast majority of current MLAs are equally ignorant of what is in the Yale Final Agreement.

A further concern with the Yale final agreement is that the Cohen Inquiry into the disappearance of Fraser sockeye over the last three seasons may be compromised in terms of what it can recommend for remedial action. With the Yale agreement having been given a large amount of management authority it has been suggested that DFO cannot take it back if this were to be a recommendation of the Inquiry Commission.

It is noteworthy that one government publication of information regarding the Yale Final Agreement lists the eight principles of the 2002 referendum in the preamble and states that these principles are respected in the Agreement in Principle. It takes creative interpretation of the Yale or any other agreement with First Nations to consider them as meeting the expectations of the public as set out in the 2002 referendum.

Government relations

Over the past year there have been many letters, and briefs submitted on behalf of the BCWF membership to Ministry officials both Provincial and Federal. After several meetings we have seen a much better understanding of our interests and issues from the current Minister of Aboriginal Relations and Reconciliation than we had in the past. Still, there is little indication that he foresees any negative consequences in the current direction of this government with the setting of aboriginal expectations so high. As well there are few indications that our time and effort to present our issues respectfully is justified in terms of beneficial outcomes for our members.

We are continually told that the fundamental force driving this government's desire to go to great length to accommodate First Nations is Section 35 of the Constitution and other court decisions. The "Haida" decision is often referred to as the benchmark that created the obligation of the Province to "consult with and if necessary accommodate" FNs. The intent was to clarify where that responsibility would lay when making land use decisions such as granting mining tenures. But Government has taken the principle much farther and developed policies that go far beyond what the courts intended.

Only the mean spirited or thick headed would not understand that First Nations people are connected to the lands in their traditional territory and often live in substandard conditions. But government should not pretend that policies intending to bring opportunities to address aboriginal poverty are any more than just that. They are policies and not law, and policies must be carefully crafted to minimize unintended consequences. Unnecessary impacts on the rights and needs of the public or on resource conservation are sometimes being seen as unintended outcomes. The decimation of the moose population in the Nass River area is an example of this. First Nations interests can be met without disenfranchising other members of our society.

Infringement of aboriginal rights

Government can infringe aboriginal rights and the justification can be for any reason. When our Federal Government looked at section 35 of the Constitution Act it found it necessary for the courts to be involved to decide if a right existed, if that right was infringed and laid out provisions to determine if the infringement can be justified. The Sparrow decision in the Supreme Court of Canada answered the question, "What does Section 35 mean?" and "What are the mechanics around applying it" It clearly lays out what Section 35 means in the real world, specifically that aboriginal rights are not guaranteed and that they can be regulated. What then follows is the onus to justify infringements of aboriginal rights. Justify to whom? To the courts of course.

With no clear definition of “aboriginal rights” the courts have become indispensible. It is inherent in how Section 35 gets engaged that the courts have a significant role in dealing with the Aboriginal people of Canada. However, this Province has a self-image of failure if it resorts to a court action to clarify any aboriginal right. Being so apprehensive makes a travesty of the rules that previous courts have laid down. The Province should be utilizing the court system the way it was intended to be used. The Province has sought to resolve problems by sidestepping this process and as a consequence bigger problems and potential divisions between First Nations and BC citizens are being created that are likely to escalate into the future.

When First Nations bring forth a complaint of an infringement of a right the Province has three options. One is, for the short term at least, is to ignore it. The second option is to say, “You’re right” and give the complainant what they want. The third option is to consider that they don’t know the answer to whether a right exists, whether it has been infringed upon, if that infringement may be justified, what would resolve the complaint to everyone’s satisfaction and to seek the advice of the Supreme Court of Canada. The Province has invariably chosen the second option.

First Nations are very aware of this and they see no shame in taking legal action because they know the only proof of a right is with a court decision, and they often lose. They want certainty while it appears our Province trying to avoid the controversy of engaging the process that would provide it instead acquiesces. Meanwhile, British Columbians see their valued heritage shrinking quickly with little to no consultation or opportunity for input on decisions that impact them and future generations.

Klappan blockade .
The blockades that occurred last fall in Region 6 impacted many British Columbians, mostly resident hunters, and there is now an expectation that the BCWF will “do something about it.” We have several options to follow not the least of which is that of legal action that, if successful, can serve as a deterrent for a reoccurrence of the obstruction. Our direction was set at the January Board meeting. We must decide on several questions:

1 – If we are to take action, specifically what will it be?
2 – Do we visualize a benefit in trying to engage in dialogue with the Tahltan?
3 – What steps must we take to inform/prepare our members for similar actions by other First Nations next year?
4- What are our legal options?

I have distributed a request for reports of impacts to resident hunters on the BCWF website, through the BCWF “Alert”, in the Outdoor Edge and through the club mailer. It is feasible that there were several hundred resident hunters and other members of the public that were impacted by these illegal actions. Although not overburdened with reports back they all involve two to four resident hunters with most of them having all the features of threats of damage to property, intimidation as well as denial of the right to access crown land. We also have copies of the “eviction” notice that was handed out to people camped in a BC Forest Service Site. We are still awaiting a reply from BCWF legal counsel with details about our legal options relating to this file. We have yet to try to open up dialogue with the Iskut Band to discuss the matter.

In conclusion
The BCWF has been largely ignored as a useful resource by government officials when forming agreements with First Nations. It is a reasonable request that we have good opportunities for

input into decision making around agreements or treaties when they can potentially impact the public and our members so much. We have set up a schedule of quarterly meetings with the major Ministers and will use this opportunity to focus persistently on this issue in particular as well as specific matters as they arise.

At the same time we must continue our efforts to open up dialogue with First Nations. For balance we must also plan our strategy to meet any future challenge of illegal actions that impact our members such as the blockades in Region 6 last year. We can expect more of these elsewhere in the Province and cannot sit idly by while the RCMP, the MOE and CO service do nothing to protect our public right of access to crown lands.

Respectfully submitted

Rod Wiebe – Chair, BCWF Native Affairs Committee