

Preliminary Discussion Paper¹
REVENUE & BENEFIT SHARING²

INTRODUCTION

Revenue and benefit sharing, which is committed to in the New Relationship, is a necessary component of a recognition-based relationship.

The Privy Council, in the *St. Catherine's Milling* case was clear that in accordance with s. 109 of the *Constitution Act, 1867*, the Province does not hold (and so cannot grant to others) the beneficial interest in lands and resources subject to unextinguished Aboriginal title.

The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, **and this interest is available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title**

... [T]here has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium **whenever that title was surrendered or otherwise extinguished.** (emphasis added)³

(the “*St. Catherine's Milling* principle”)

The converse of this proposition is that, if the estate of the Crown has not been ‘disencumbered’ – that is, if the Aboriginal title has not been extinguished – such lands are not available to the Province ‘as a source of revenue’.

The *St. Catherine's Milling* principle has been affirmed by the Supreme Court of Canada on several occasions, most recently in the *Haida* case⁴. In *Haida*, the Province invoked constitutional federalism, and argued that its exclusive right to the lands and resources in B.C. cannot be limited by the protection of Aboriginal rights found in s. 35 of the *Constitution Act*, or by s. 91(24). In rejecting this argument, the Supreme Court of Canada reminded the Province of s. 109, and the *St. Catherine's Milling* principle:

¹ It is intended that the FNLC will take this discussion paper to the Chiefs for dialogue and input in early fall 2008 and adapted to reflect that input.

² Partially adapted from 2002 Tripartite Stream 2 Report: Cooperative Management and Revenue Sharing

³ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), App. Cas. 46 (P.C.) at p. 55.

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

The answer to this argument is that the Provinces took their interest in land subject to “any Interest other than that of the Province in the same” (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine’s Milling ...*, lands in the Province are “available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title” (p. 59). The Crown’s argument on this point has been canvassed by this Court in *Delgamuukw, supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine’s Milling, supra*. There is therefore no foundation to the Province’s argument on this point.⁵

Given the *St. Catherine’s Milling* principle and the Supreme Court of Canada’s further clarification in *Delgamuukw*⁶ that Aboriginal title, which has not been extinguished in B.C., is a right to land with an inescapable economic component, the sharing of revenue and benefits is a requirement of the constitutional arrangement if the Province is to provide any certainty when it grants interests in land or resources to others. Revenue and benefit sharing also provides an opportunity to fulfill the other objectives of the New Relationship of addressing social and economic conditions – closing the gap and creating capacity for First Nations’ governments to participate in effective shared decision making processes and institutions.

NEW RELATIONSHIP COMMITMENTS

We agree 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 First Nations’ historical and sacred relationship with their territories...

To achieve First Nations self-determination through the **exercise of their aboriginal title including realizing the economic component** of aboriginal title, and exercising their jurisdiction over the use of the land and resources through their own structures...

⁵ *Haida, supra*, at para. 59.

⁶ *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010.

To achieve these strategic goals, we recognize that **we must achieve First Nations economic self-sufficiency and make First Nations a strong economic partner in the province and the country** through sustainable land and resource development, **through shared decision-making and shared benefits that support First Nations as distinct and healthy communities.** All British Columbians will benefit from a richer understanding of First Nations culture and from economic, political and cultural partnerships with First Nations...

We will mutually develop processes and implement new institutions and structures to achieve the following:

- mutually acceptable arrangements for sharing benefits, including resource revenue sharing...

This paper provides a general overview of some of the principles, goals and possible models to achieve revenue and benefit sharing between the Province and First Nations in British Columbia on the basis of recognition of co-existing titles and jurisdictions, as agreed in the New Relationship.

PROVINCIAL RESOURCE REVENUES

In the fiscal year ending March 31, 2008 provincial revenues totaled \$39,831-million, which included \$19,406-million in taxation revenues and \$3,778-million in natural resource revenues.⁷

Provincial taxation revenues in 2007/08 included (in millions):

- Personal \$6,959
- Corporate - \$2,252
- Social Service - 5,089
- Property - \$1,693
- Fuel - \$500⁸

Provincial natural resource revenues in 2007/08 included (in millions):

⁷ Government of BC, "Public Accounts for the Fiscal Year Ended March 31, 2008, p. 40

⁸ *Ibid*, p. 106

- Petroleum, natural gas and minerals \$2,079
- Forests \$1,076
- Water and Other \$587⁹

Provincial Expenditures

In 2007/08 provincial expenditures totalled \$36,945-million, which included \$1,974-million in expenses in the natural resources and economic development sector. (-bid, p. 106)

Expenses in the natural resources sector included (in millions):

- Salaries and benefits \$556
- operating costs \$863¹⁰

In November 2009, BC received \$115-million in its November auction of leases and drilling licences for new natural gas exploration.¹¹ This brings total provincial revenues from the sale of exploration rights to \$2.57 billion during the 2008/09 fiscal year.¹²

GOALS OF REVENUE AND BENEFIT SHARING

1. Principle-based

Principles for revenue-sharing agreements include:

- a) Revenue and benefit sharing is an expression of recognition of co-existing Aboriginal and Crown titles and jurisdictions. It occurs on the basis of co-existing titles, with revenues and benefits flowing to both the Province and First Nation Governments.

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 87

¹¹ Globe and Mail, "B.C. doubles take from land auctions", November 14, 2008

¹² *Ibid.*

- b) Revenue and benefit sharing occurs on a government-to-government basis and contributes to relationship building. Good relationships can help bring about new economic and other mutually beneficial opportunities.
- c) Revenue and benefit sharing also occurs between proponents and First Nations.
- d) Revenue and benefit sharing must be inclusive of all First Nations.
- e) Revenue and benefit sharing addresses, in part, First Nations' interests in maintaining a link with lands and resources throughout their traditional territories.
- f) Revenue and benefit sharing supports fiscal self-reliance of First Nation governments through an independent source of financial resources.
- g) Revenue and benefit sharing assists First Nations to apply financial resources to the priorities of the community, including participating in a meaningful way in land and resource development.
- h) Revenue and benefit sharing between the Province and First Nations is distinct from any impact benefit type negotiations between First Nations and industry/proponents.
- i) Revenue and benefit sharing supports effective shared decision-making by ensuring that all parties in a shared decision-making process share in the benefits.
- j) Revenue and benefit sharing improves the investment climate in BC and contributes to a more predictable environment for land and resource development.
- k) Revenue sharing does not preclude or disentitle First Nations from accessing government programs.

2. Contribute to capacity development of First Nations

A sustained or ongoing stream of revenues and benefits to First Nations will assist to enable them to build human and infrastructure capacity to function as governments in a range of areas (economic development, employment and training, social programs, public administration, etc).

3. Contribute to certainty / Stability on land base

A major source of social and economic uncertainty is the continued exclusion of First Nations from sharing in revenues and benefits that are generated from the use of their lands and resources - whether for resource extraction activities or other modes of generating revenues. This is despite the First Nations having Aboriginal title, which includes an economic component, over those lands.

First Nation participation in economic development, through decision-making and sharing in revenues and benefits derived from or on their territories, is essential to fostering a certain and predictable investment climate in British Columbia and, therefore, stability on the land base. First Nations can contribute to the economic growth of the province where they have a meaningful role in the economy and enjoy the revenues and benefits at their own discretion.

OPTIONS AND ISSUES FOR REVENUE SHARING

Appendix 1 outlines various options for sharing revenues from resources and other sources among First Nations, industry, federal and provincial governments.

Revenues & Benefits: Public Sector Revenues

Public sector revenues are the public sector portion of resource rents, plus revenues from income, sales and other forms of taxation (e.g. property sales and taxation). Revenue-sharing agreements could be used to provide First Nations with a share of public sector revenues.

Revenue-sharing might involve separate revenue-sharing agreements with individual First Nations or a province-wide agreement for a number of First Nations, or a combination of both.

Types of Revenue and Benefits to be Shared

Public revenues include revenue linked to resource extraction (e.g. forestry, mining, oil/gas), as well as non-resource based revenues (e.g. from sales, income and other taxes, gaming). The latter are particularly relevant to First Nations situated within urban settings, given the limited amount of resources in those areas.

One option for sharing public sector revenue flows and benefits with respect to specific resources is to negotiate (not impose a formula or approach) sector-specific agreements that provide First Nations with a portion of actual resources (e.g. Allowable Annual Cut, fish allocation), along with a sharing of revenues. This type of agreement may produce similar results to revenue and benefit sharing agreements. In particular, First Nations could be provided with direct access to the sum of private and public sector revenues associated with the resource. In addition, this type of agreement may be consistent with co-operative management objectives to the extent that First Nations are provided with discretion over how their share of the resource would be developed.

Determination of Funding Flows to First Nations

Possible methods for determining general revenue-sharing flows to First Nations include:

- a. Percentage of Revenues — Revenue flows would be determined as a percentage of public revenues. This approach would require a clear technical understanding of the basis on which revenues would be determined. For example, would revenues be determined from gross revenues, or from net revenues after certain costs had been deducted? This method may be administratively convenient, but

could result in uncertain and volatile First Nation revenues since it would be exposed to market price and demand changes. Also, revenues would be affected by taxation and extraction policies. However, it may be possible to reduce volatility through averaging, floors/ceilings or other techniques.

- b. **Pre-determined Amounts** — Pre-determined amounts of revenues would be notionally funded from specified sources and made available to First Nations. This method would provide First Nations with more fiscal certainty, since their revenues would not be impacted by market pressures, or taxation/extraction policies. However, this method would not necessarily specifically link revenues to the First Nation's territory and work would be required to determine an appropriate amount (e.g. formula or methodology for calculating amount), which could be renewed after a specified period of time.

- c. **Hybrid Approaches** — Revenue flows could be determined according to various hybrids of the above options. For example, First Nations would be provided with a minimum pre-determined base amount, plus a percentage of public revenues above a specified level.

Some agreements in Canada incorporate a 'tiered' approach whereby percentages of specified amounts are set out along a spectrum with regard to a particular sector/resource or project (e.g. X% of the first \$X million generated, X% of additional revenues...). Such an approach could flow a significant amount of funding to a First Nation initially, helping the First Nation to develop capacity more quickly and securing an ongoing stream of revenues thereafter.

Geographic Basis of Revenue Sharing

Revenue-sharing agreements may apply to revenues generated from defined geographic areas. However, the ability to identify revenues from a project or region may vary across revenue sources. For example, it may be possible to identify mining tax revenues from a

particular mine. However, it would be more difficult to determine revenues from a transmission line servicing the mine (and other projects).

Options for the geographic basis of agreements include the sharing of revenues from:

- a. A specific project, such as an oil well or mine;
- b. A specified region or territory;
- c. Province-wide.

Distribution of Revenues Across First Nations

A mechanism for distributing revenues across First Nations may be required. Decisions regarding distribution mechanisms may be based on an appropriate balance between local factors (e.g. resource development projects in the local area) and equity considerations.

Possible options include:

- a. Linked to Territories (e.g. territory(ies) specific; linked to activities) — Revenues received by a First Nation would be linked to resources extracted from their territories. This option may be viewed as consistent with First Nations' links to territories, but could result in an uneven distribution of revenues across First Nations, given the uneven distribution of resources across the province. Also, this option may require an approach for addressing potential overlap issues. This approach could result in uncertain and volatile First Nation revenues since it would be exposed to market price and demand changes;
- b. Not Linked to Territories (e.g. province-wide) — Revenues would be pooled and distributed across eligible First Nations (or groups of First Nations) according to other criteria (e.g. equalization principles, equal per capita, etc). While this option de-links revenues from their territories, and calculating amounts could be complex (though the

administration of amounts may be simple), it could ensure more predictable funding and avoid equity and potential overlap issues; or

- c. Hybrid Approaches — Distributions of revenues could be determined by various hybrids of the above two options. For example, a portion of revenues could be linked to extraction from a traditional territory and a portion would be distributed across First Nations according to some other criteria.

Contributions from Canada

To the extent that revenue-sharing agreements focus on the sharing of provincial resource revenues with First Nations, it would be important to understand how the federal government would contribute to these agreements.

Revenues & Benefits Private Sector

Private sector joint-venture agreements may allow First Nations to share in private sector revenues. These types of agreements may also result in increased First Nation participation in the economy.

With respect to how the Province and Canada could contribute to private sector joint ventures with First Nations the following are some ideas:

1. Direct funding transfers to joint venture partners.
2. Financial support to enable First Nations to purchase equity shares.
3. Assistance in increasing First Nation capacity to participate in joint ventures.
4. Commitments to legislative/regulatory change necessary for joint venture partnerships to succeed.

5. Transfers of portions of public sector rent to the private sector through tax preferences and other policies.
6. Terms and conditions on tenures to compel proponent to work with First Nations to engage them in the project and to address the First Nations interests and concerns (e.g. requiring Impact Benefit Agreements).

Accommodation Agreements

The Crown has a legal obligation to consult with, and accommodate, First Nations 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. The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown. (*Haida*, para 16) To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (*Haida*, para 27)

Accommodation occurs where consultation determines that a contemplated Crown decision may impact Aboriginal title or rights (in regard to a specific project). Revenue and benefit sharing generally does not address key issues related to specific projects (such as avoiding or mitigating impacts) and is not a process whereby First Nations interest or concerns with regard to a proposed project or activity can be identified and addressed. Therefore, accommodation is distinct from general revenue and benefit sharing on the basis of co-existing titles and jurisdictions (although, specific revenue and benefit sharing with regard to a specific project may form a component of an accommodation agreement).

BC's Proposed Approach

The Province has unilaterally developed a new framework for revenue sharing model for revenue sharing that diverges significantly in terms of principles and content from the vision of First Nations, and notwithstanding that the FNLC and BC have been engaged in negotiations to mutually develop new frameworks for shared decision-making and revenue and benefit sharing at the RWG Table.

In those negotiations, the Province revealed that it:

- is not interested in creating new uncertain statutory obligations or requirements that would require certain forms of shared decision-making and revenue sharing (i.e. statutory triggers for the negotiation of template agreements). Rather, a Framework Protocol (attached to an Act) and sub-protocols (not attached) *may* be developed as political frameworks with common elements and approaches outlined to *inform* negotiations between First Nations and the Province;¹³ (emphasis added)
- does not believe that creating new statutory requirements for third parties to enter into Benefit Sharing Agreements or for defining conditions when the Province is statutorily obliged to negotiate a revenue or benefit-sharing agreement with a First Nation will be feasible or indeed effective in the objective of facilitating better linkages of First Nations people in to local economic development;¹⁴ and
- has a mandate to develop a protocol focusing on benefits-sharing associated with major project developments.¹⁵

The Province's own new framework purports, at direction of Cabinet, to move from a "legally driven" approach to revenue sharing (where each ministry takes a different approach, resulting in different arrangements), to one that is more consistent across ministries. The Province proposes that First Nations should share in benefits "directly related

¹³ See BC paper "Provincial Representatives Perspective on the Status of Recognition and Reconciliation Act Concepts" (September 8, 2008) at pg. 1.

¹⁴ *Ibid* at pg. 4.

¹⁵ *Ibid*.

to development” and that those benefits “recognize impact on rights and title.” Their goal is to minimize litigation, while also linking the sharing of benefits to treaty. The Province also aims to tie revenue sharing to the socio-economic goals of the tripartite *Transformative Change Accord* by requiring First Nations communities to enter into “Economic Community Development Agreements” (ECDA). By this tool, the Province wants to direct how revenues will be used by First Nations – that is, for pre-determined socio-economic purposes (whereas the First Nations’ vision is that revenue sharing arises from its Aboriginal title and that it is solely up to the First Nation how it uses or expends any such revenues it receives through revenue sharing based on co-existing titles). Once the Province engages in “exploratory discussions” with a First Nation to exchange information, explain the provincial approach, check with other ministries, and prepare a provincial mandate request, the Province will take the ECDA to the provincial Cabinet Committee on the New Relationship for approval. Before approval within the provincial system, the ECDA must consider the following factors:

- economic impact,
- strength of claim,
- population of First Nation,
- future development potential of the area,
- degree of impact, and
- proponent benefits.

A requirement to consider “strength of claim” is entirely inconsistent with the recognition of Aboriginal title and rights already set out in the New Relationship. Further, consideration of factors such as “population of First Nation” harkens back to the unilateral formula approach developed in the Forest and Range Agreements.

Finally, within this new provincially-developed framework, the Province proposes another “benefit” may be to include a “consultation process and role for First Nations in the project approval process” – falling far short of the shared decision-making role, based on co-existing titles, as already committed to in the New Relationship.

This new framework was not developed collaboratively with First Nations, despite the commitments in the New Relationship to mutually develop “new institutions and processes...for revenue and benefit sharing.” Yet, the Province has already unrolled this new framework publicly. On October 23, 2008, the Province announced it would “share mining benefits with First Nations”. The process for development of revenue sharing will be decided on a “project-by-project basis” and would be related to “new mining projects” and place a “strong focus on community development to assist First Nations in achieving their social and economic goals.”

APPENDIX 1 - REVENUE-SHARING OPTIONS AND ISSUES

REVENUE & BENEFIT SHARING

Governments extract revenues through resource, income and other taxes Provincial Resource Revenues

OTHER

PUBLIC SECTOR REVENUE-SHARING OPTIONS

The following are design issues associated with public sector revenue-sharing

1. First Nation Eligibility
2. Types of Revenues to be Shared
 - Resource, sales, income, gaming, other?
3. Determination of Funding Flows
 - Portion of revenues—volatile and more exposed to market changes
 - Pre-determined amounts notionally funded from a source—known fiscal impact
4. Geographic Basis of Revenue Sharing
 - Specific project (e.g. oil well, mine)
 - Portion of territory
 - Province-wide
5. Distribution Across First Nations
 - Linked to territories
 - Not linked to territories (e.g. equalization)
 - Hybrid
6. Links to other Funding
 - Band, self-government and other funding not impacted
7. Contributions from Canada
 - Would Canada participate?

PRIVATE SECTOR REVENUE-SHARING OPTIONS

Economic profits above normal return available to the private sector, usually received as dividends or capital gains
The following are some options for FNs accessing private sector revenues:

1. Joint Venture/Equity Partnerships
 - FN receives equity share of private profits.
2. Ad Hoc Arrangements
3. Employment/Contract Arrangements

ACCOMMODATION AGREEMENTS

1. Crown – First Nation Agreements
 - Specific projects / impacts
 - Likely to include financial component
 - May include land protections, terms and conditions on tenures, mitigation measures, etc. (“toolbox”)