Speaking Notes of Louise Mandell QC
FNLC Meeting – November 25-26, 2008

Part I: Legal Snapshot: The Ghost[1]

Denial of Aboriginal Title is Against the Law

There is an obstruction which prevents B.C. from engaging in an honest, meaningful, respectful relationship based on recognition of unextinguished Aboriginal title and rights. As the Courts have repeatedly said, the concept seems pretty simple: "Canada's Aboriginal peoples were here when Europeans came, and were never conquered." (*Haida)*

Yet, there is something in the way. In spite of the recognition of Aboriginal title, extolled in law and policy, and in spite of the New Relationship agreement "to establish processes and institutions for shared decision making about the land and resources and for revenue and benefit sharing", there is an invisible, yet palpable obstacle present at the negotiating tables; we have heard its voice in our work on Recognition Legislation - and in Court.

I will call this presence, this obstacle, "The Ghost". It is the thing from the past which is troubling the present, that continues to cause a disturbance and subvert our goals. It will do so as long as it is being fed.

Spotting the Ghost

The Ghost was a stowaway in the enterprise of European colonial imperialism. It landed in the newly claimed British Columbia with the first settlers. The Ghost created the kind of thing that a Ghost is really good at building: illusions. The first illusion: By planting the flag, the Crown claimed complete ownership and jurisdiction over everything.

The Ghost then began to spread lies about the Indigenous peoples who had stewarded the land beautifully and successfully for generations and centuries. As with all good lies, they came with many alternative fallbacks. The Ghost's mantra is denial and its favorite illusion is *terra nullius:* the land *was* unoccupied; or if occupied, it was by people who weren't really civilized; or if civilized, they didn't have concepts of land ownership; they did not have real laws; or if they did have laws or rights, they were all extinguished; or if not extinguished, the land they used was just small, spotty, postage-sized parcels (just the

[1] The section on "*The Ghost*" is adapted from an article I wrote, which will be published as Chapter 4 in an upcoming Canada Law Book publication entitled, "*Aboriginal Law: Developments Since Delgamuukw*".

size of reserves, actually). And the Ghost was a boaster. The Crown represented a superior race of people with a real government which made real laws and had real state power. The Ghost whispered: "First Nations are primitive – without laws. The Crown is superior – worthy of the greatest respect and absolute deference."

Brilliant Indigenous scholars, including Robert A. Williams, described the phenomenon of the Ghost as stereotyping "the savage Indian." He traces its origins back several centuries ago, to the first colonizers – the Greeks and Romans and Mediaeval Christians – who saw all other peoples on a four-stage scale of social development: primitive, pastoral, agricultural and commercial, and of ascending stages of civilization, with Christian, European-derived nations placed at the very top of the scale, and Indigenous peoples at the very bottom. Embedded in this mindset is a "noble" vision - a commitment that distant territories and their inferior peoples should be subjugated, but the benefits offered by the superior dominion (Christianity, democracy, capitalism) would be provided to the subjects. It was a duty of the superior race, over and above the mere profit motive, to bring their knowledge, political institutions, superior economic structures, and the truth of Christianity, to less evolved races so as to promote their evolution. The cultural imagination of the western powers believed it had a right, indeed an obligation, to rule.

The Ghost Has Friends In High Places

When it comes to the dispossession of Indigenous Nations in British Columbia, the Province's method is simple. The Province asserts *de facto* control, ownership and jurisdiction over 100% of the lands and resources, while denying the existence of unextinguished Aboriginal title and its constitutional consequences (the "denial policy"). The denial policy is inspired by the ghost. It was formulated early in the Province's history, and its favourite son was the first Lieutenant Governor of the Province, Joseph Trutch, who had served as Chief Commissioner of Land Works. He was a man in high places indeed; to control land policy in the colony was to control the fate of the native peoples:

> "The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; I cannot see why they should either retain these

> lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government or to individuals."[2]

The ghost is pleased. The denial policy is still in provincial legislation, policies and treaty negotiation mandates.

The Ghost Is An Outlaw

Of course, being what it was, the Ghost never wanted the question to be called, or the lights put on - never wanted the higher authority of *the* Courts to determine the validity of its spectral illusions. This is because the Ghost is an outlaw, and the denial policy it fosters is illegal. The Courts have said so.

By 1871, when British Columbia joined Confederation, a fundamental principle of the common law had taken root. It was first formally expressed in the *Royal Proclamation of 1763*, and given expression again by Justice McLachlin (now Chief Justice) in *Van der Peet*, when she stated clearly that " the maxim of *terra nullius* was not to govern." The Ghost apparently did not hear straight when, in 1888, in *St. Catherine Milling*, the highest British Court established that provincial Crown title could not be complete unless Aboriginal title was dealt with. The Court went on to say that the "lands, mines, minerals and royalties" are available to the Province as a source of revenue only when Aboriginal title has been extinguished. The Ghost whispered, "Ignore all of that". On B.C. went, taking up Indigenous land illegally.

The Ghost's continued existence requires delay in having the land question answered. While the land question remains undecided, the Province assumes the resources are held within its sovereign hands. For years the Ghost has been fed by government policy and legislation. For years, it was illegal under Colonial law for Indigenous Nations to go to Court to address the land question, or for others to help to do that. When the land question was finally brought to Court, beginning with the *Calder* case, the Supreme Court of Canada rejected the Ghost's ghastly logic.

In 1975, *Calder* showed that Aboriginal title, which pre-dated and survived the assertion of sovereignty, exists as a legal right, independent of Crown recognition. The Ghost whispered "It's a split decision 3:3 - ignore all of that". On B.C. went, taking up Indigenous land illegally.

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[2] Joseph Trutch, Commissioner of Land Works for the colonial government in British Columbia, 1867.

Finally, with *Delgamuukw*, the Supreme Court of Canada urged the Province to give up the Ghost; "We are all here to stay". Aboriginal title had not been extinguished in B.C. It has jurisdictional and economic components. Title was here to stay.

But the Ghost was not dispelled. "Prove your title in Court" was what the Crown declared. And until then, on we'll go, taking up your lands and using the resources. The old liar and illusionist was still on the ramparts, and like the Ghost of Hamlet's father, cried, "Remember me".

The Court in *Haida* was up to the challenge. It concluded: "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 benefits of that resource. This is not honourable." The *Haida* Court reminded the Ghost that "lands in the Province are available to [the Province] as a source of revenue, whenever the estate of the Crown is disencumbered by the Indian title." Reconciliation of the prior existence of Aboriginal societies, with assumed Crown sovereignty *was* the fundamental objective of Section 35.

And then *Campbell* shone more light. We learned what the Elders have always said: "Indigenous laws exist and have weight". Jurisdiction is not exhaustively distributed between Canada and the Provinces. Indigenous laws are protected and sustained by the common law, and embodied as Aboriginal rights in Section 35.

Giving Up The Ghost

And so it came to be that the Province tried to give up the Ghost. It turned to the Aboriginal leadership (who had recently concluded the historic Leadership Accord) to help in making the systemic changes that the law required. This resulted in the New Relationship.

There have been achievements because of the New Relationship, which the B.C. Liberal government can take pride in fostering. One is the establishment of the New Relationship Trust Fund. The fact of the New Relationship has improved and elevated the dialogue around recognition issues, both in Government and with the general public. There are many others.

The Ghost Does Not Give Up

Yet, the Ghost continues to enjoy a seat in high places. It can still be heard speaking through the Crown's fixed mandates which it brings to the treaty negotiation process. The common table has identified some ghostly problems with these mandates. The governments are unwilling to discuss land, except approximately 2 to 5 % of a First Nation's traditional territory, which must be held under provincial jurisdiction as fee simple land. They insist on extinguishment of title, dressed up in new words of "modification and release". The government negotiators are mandated to insist on a jurisdictional arrangement where First Nations' inherent governments and laws must give way to conflicting federal and provincial laws. Denial runs deep. The governments refuse to negotiate compensation for past infringements, and they insist on a taxation arrangement which supports the goals of the provincial government, but not the Aboriginal governments. These mandates are more in alignment with the 1969 White Paper policy than with the New Relationship.

The Ghost also enjoys fashioning the Crown's litigation strategies. In Court, it still murmurs that Aboriginal title doesn't really exist. The Ahousaht people have just concluded an over one hundred day trial where the governments argued that the Ahousaht people do not exist. The Ghost continues its plaintiff battle cry that the Crown is supreme in the unilateral decisions it continues to make.

When the New Relationship was first concluded, Premier Gordon Campbell, in his address to the First Nations Summit on September 28, 2005, said:

> "… let me say to Chief John – he has raised this with me before but I should say it to all of you today – that we have heard the concerns of how we have approached the litigation in the courts. We understand that our litigative strategies in the past have been offensive, and that was certainly not what our intention was. I have instructed the Attorney General and the Minister of Aboriginal Relations and Reconciliation to review our litigation strategy and to come back with a report to us as soon as possible, so that when we are in court, if we are in court, we are able to argue in court in a way that is respectful to you, to First Nations, and to the history and the spirit of what we are trying to do as we build this new relationship."

But that has not occurred. It's the Ghost run wild over there at the A.G.'s office, and the Courts continue to point out its illegal behaviour. This is clear from a brief examination of the legal landscape which has taken shape since the New Relationship was concluded.

***R. v. Morris and Olsen*[3]**

The Wildlife Officers set a decoy to trap the hunters in the act – hunting to feed their families and supply the game to the Big House for winter ceremonies, as their ancestors had done for centuries before, pursuant to a Douglas Treaty hunting right "to hunt … as formerly".

The Supreme Court of Canada rejected the Province's argument that the Province has jurisdiction to apply its *Wildlife Act* to interfere with a Treaty hunting right. The Court confirmed that the Treaty hunting right includes the right to hunt at night, and this right continues to be governed under the ancient hunting laws of the Coast Salish people, since the Province has no power to interfere with the right, and Canada has not tried to occupy the field.

Huu-ay-aht First Nation et al. v. The Minister of Forests et al.,
2005 BCSC 697 ("*Huu-ay-aht*")

Following the Court's decision in *Haida*, the Province made amendments to the forestry legislation, introducing a program without First Nations consultation, which involved taking back 5% of the tenures of large forest companies, with compensation to them, and making some of this timber available to First Nations. The program also involved a Treasury Board allocation of a fixed sum of money (approximately $50,000,000.00), which would also be offered as revenue sharing through FRAs on a *per capita* basis. As a condition of receiving resource and revenue sharing benefits, the Province required that First Nations agree that they had been consulted in advance about administrative and operational decisions which had yet to be made, including the renewal of large-volume forest licences. The Province made it clear that the FRA was a 'take it or leave it – one size fits all' offer, in the sense that the formula the Province had established to distribute these benefits was non-negotiable. The existing legislative and policy framework was also non-negotiable.

[3] *R. v. Morris*, [2006] 2 S.C.R. 915.

The FRA template was challenged in *Huu-Ay-Aht,* where the Court held that the fixed formula in the FRAs constituted bad faith bargaining. The Crown could not simply adopt a 'one size fits all' approach to consultation and accommodation of Aboriginal rights and then seek to impose it upon the Plaintiffs in a 'take it or leave it' approach:

> The duty to consult may lead to a duty to accommodate by changing government plans or policy in response to Aboriginal concerns…. Hard bargaining is one thing; sharp dealing is quite another. The former is not offensive, but the latter is. Accommodation begins when policy gives way to Aboriginal interests. (paras. 116-117)

***Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700 ("*Xeni*")**

In *Xeni*, the Province erected a new legal theory - new-speak for the Ghost's favourite doctrine, *terra nullius*, which Justice Vickers found reflected an impoverished understanding of Aboriginal title. Aboriginal title, the Province argued, exists only in relation to small sites that were physically occupied, such as village sites. The argument goes that because First Nations have the onus to prove Aboriginal title, should they fail to meet this onus in Court, the lands and resources belong to the Province by default.

Had the Court granted a declaration of title, it would follow that the provisions of the *Forest Act* which authorize the management, acquisition, removal and sale of timber on Aboriginal title lands, affect the very core of Aboriginal title, which is within 91(24). The Province's *Forestry Act* therefore, does not apply to Aboriginal title lands. If, however, the Court was wrong about the jurisdictional ouster, then the Court went on to hold that the forestry legislative scheme unjustifiably infringes Aboriginal title in all three of its essential elements – the right to use, the right to choose, and its inescapable economic component.

***Wii'litswx v. B.C. (Minister of Forests)*, 2008 BCSC 1139 ("*Gitanyow*")**

At issue in *Gitanyow* was a decision to replace 6 forest licences. The Gitanyow alleged that the Crown had failed to adequately consult and accommodate. The Court agreed and is considering the remedy. The Court held, among other things, that:

- the Crown had failed to do a proper preliminary assessment of the strength of claim;

- the Crown had failed to acknowledge the importance of the Gitanyow's traditional land tenure system and its role in perpetuating the Gitanyow's distinctive culture;

- that consultation must result in outcomes, not just process.

The Ghost's illusions became delusions in the *Gitanyow* case. Provincial lawyers apparently represented that revenue and benefit sharing was being pursued through the Aboriginal Forest Strategy Working Group ("AFSWG"), which was a body jointly established by B.C. and the First Nations Forest Council. Based on this understanding, Madame Justice Neilson did "not find it unreasonable for the Crown to decline to consider Gitanyow's claim for substantial sums as its share of past and future logging revenue until the ramifications of such an approach can be considered at a broader level." She suggested that such an approach "suggest[s] good faith ongoing consultation and accommodation on the part of the Crown to advance this process", since this approach "apparently has the blessing of both the Crown and the First Nations Forest Council".

There was never a provincial working group addressing the kind of revenue and benefit sharing contemplated in *Gitanyow* – a fact which was corrected in the Affidavit of Grand Chief Stewart Phillip, when the issue of remedy returned to Court for further arguments. The Court's decision on remedies is pending.

Ke-Kin-is-Uqs v. British Columbia (Minister of Forests),
2008 BCSC 1505 ("*Hupacasath*")

In 2005, the Hupacasath brought a judicial review application seeking to overturn the Province's decision to allow the removal of private lands from Tree Farm Licence 44 ("TFL 44"), and its decision to amend the allowable annual cut ("AAC") for TFL 44, on the basis that the Crown breached its constitutional duty to consult.

The Court noted that the Hupacasath people have used the lands in question since prior to contact for hunting, gathering food and medicinal plants, fishing, and harvesting cedar. They also have sacred sites throughout their territory which must be secluded from, and untouched by, other human beings, including Grassy Mountain, which is located within

the lands removed from the TFL and which has never been logged. The removed lands are also part of the Hupacasath land selection in the B.C. Treaty Process.

In her 2005 decision, Madame Justice Smith concluded that the Crown had breached its duty to consult regarding the Province's private land removal decision, and issued a declaration to that effect, but allowed the decision to stand because of evidence that setting aside or suspending the decision could significantly prejudice the TFL holder. The Judge ordered the Minister of Forests to consult with Hupacasath regarding the private land removal, and imposed certain conditions restricting the use of the private lands for a two year period.

The two year period expired without resolution of the issues between the Hupacasath and the Crown, and the Hupacasath returned before Madame Justice Smith. She concluded that the Crown misapprehended its duty to consult and accommodate. She rejected the Crown's argument that even if it was required to accommodate, the steps it took were reasonable. She concluded that the Crown did not conduct the process reasonably, and held that the "duty required a process focused on the possible impacts of the Removal Decision."

Having concluded that the Crown has not yet fulfilled its duty to consult and accommodate with respect to the private lands removal, she granted the remedy sought by the Hupacasath, that an independent mediator be appointed. She provided that the mediator address appropriate accommodation considering the effects of the Removal Decision, ongoing environmental, watershed and wildlife protection, ongoing access to their sacred sites and areas where the Hupacasath have traditionally gathered medicinal plants, including addressing ways of respecting Hupacasath cultural practices. These accommodation discussions will involve the company. The mediator will also consider possible accommodation from resources on the Crown lands for the losses as a result of the removal order, access to cedar, other plants and wildlife previously available to the Hupacasath on the Removed Lands.

***Klahoose First Nation v. Sunshine Coast Forest District (District Manager),* 2008 BCSC 1642 ("*Klahoose*")**

The recent decision in *Klahoose* involved a successful challenge to an approval of a Forest Stewardship Plan (FSP). The Court confirmed that the Crown cannot rely upon fettering arguments – that is to say, its legislation cannot limit the scope of its duties. The Court confirmed as a general principle that the duty to consult and accommodate is constitutional and upstream of legislation, and cannot therefore be circumscribed or avoided by reliance on legislation. The Court held that Crown decision makers cannot follow legislation or policy in a manner which offends the *Constitution*.

The Court added to the chorus of judges who have held that the Crown's obligation includes providing First Nations with adequate information, and that this obligation is not limited to information which the Province's forestry legislation requires licensees to provide. The Court also rejected the Crown's position that it was more appropriate to deal with Klahoose's information requests in the context of cutting permit applications.

The Crown argued that Klahoose should not be permitted to put forward information to establish the strength of its claim in Court if that information was not before the Crown when making its decision. The Court clarified that information to support a *prima facie* case for Aboriginal title or rights can continue to be developed throughout the consultation process. The consultation process has to provide opportunities for this. The Court also held that if the Crown conducts an assessment of the strength of claim, it has to consult with the First Nation about the results.

Continuing the trend in the Courts to limit third party activities pursuant to Crown granted tenures which suffer a fundamental legal defect, the Court ordered a stay of all further activity and operations occurring under the FSP by the company. The licensee has submitted an amendment application to extend the FSP to cover all of TFL 10. The Court directed that the Crown consult on this amendment, including sharing information that may not be statutorily required in relation to an FSP. Klahoose must be involved directly in decision making concerning any accommodation.

Jules and Wilson[4]

Two Interior First Nations, the Okanagan and Secwepemc, represented by their Tribal

Councils, issued permits to their member Bands - the Okanagan, Adams Lake, Neskonlith, and Splatsin Bands – to log in accordance with their laws within their traditional territories, to provide housing for their membership, and to challenge the Province's authority over their lands and forests. The logging which started these proceedings occurred in 1999, following the Supreme Court of Canada's decision in *Delgamuukw* where the Court resolved a thirty year legal battle and held that Aboriginal title had not been extinguished in B.C., and that it had a jurisdictional and economic component. When the Province refused to put that decision into effect, logging commenced with the Okanagan Indian Band logging in the Browns Creek area near the head of Okanagan Lake and the Secwepemc Bands logging in the Harper Lake area.

Shortly after the logging activities took place, the Ministry of Forests issued a stop work order, and then went to Court seeking a compliance order, and obtained an injunction preventing members of the Bands from doing any more logging. The Okanagan and Secwepemc Nations challenged the constitutionality of the provincial legislation, based on their Aboriginal title and rights. They also successfully challenged the Province, who started these proceedings, to assume the onus to first prove its claim of 100% ownership and jurisdiction over the land and timber in the Province – an assertion which the Province has enshrined in the forestry legislation.

In 2003, the Supreme Court of Canada, recognizing the public importance of the Aboriginal title issues engaged in these proceedings, ordered the Province to pay the Bands' legal costs. In an effort to avoid this order, the Province unsuccessfully brought a motion to discontinue. In 2005, the Province brought a second motion, also unsuccessfully, to remove the Aboriginal title issues from the litigation by severing and proceeding with the rights issues. The Court rejected this motion too, but stayed the Secwepemc case, allowing only the Okanagan case to go forward.

But, in, 2007, the Province tried again, and this time they were successful in severing the title issues out of the trial. Just prior to bringing the severance application, which is the subject of this leave application, the Supreme Court of Canada, in *Gray* and *Sappier*,

[4] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371.

found that the Mi'kmaq and Maliseet had established an Aboriginal right to harvest wood for shelter, transportation, tools and fuel. Following *Gray* and *Sappier*, the Province advised that it was making an admission that the Okanagan Indian Band has an Aboriginal right to harvest timber for domestic purposes, within the traditional territory of the OKIB, including on the cut block site where the logging took place in 1999. Based on the admission, and the impending close of the *Tsilhqot'in* trial, the Province brought a severance motion to sever the title issues and try the rights issues first.

The lower Court ruled that Aboriginal title issues should be severed from the Okanagan's case on the basis that it could be cheaper to the public purse to decide the case without addressing the Aboriginal title issues, and because the issues would be decided by the Court of Appeal in the *Tsilhqot'in* case - a second case which had achieved a costs order. This decision was upheld by the majority of the Court of Appeal. In a sharply worded dissent, Mr. Justice Donald pointed out that the Okanagan have been assigned a different cause by the Province:

> Ordinarily, it is assumed that the parties to litigation will fight for their respective causes. But here, the appellants have been assigned a cause which does not satisfy their goal of establishing authority over the forest lands; and they have to lose the justification issue to move on to the title determination under the umbrella of the costs order.

On December 4, 2008, the Supreme Court of Canada denied leave to appeal. The title issue engaged in these proceedings cannot be litigated on the costs order; but they can be litigated. They are not going away. The Ghost loves delay.

Since *Haida*, there have been over 30 cases challenging illegal Crown conduct, the vast majority of which have been won by First Nations. The Courts have shown that Government conduct, reinforced by current policies and legislation, falls below a legal minimum. This presents a problem not only for Aboriginal communities, in terms of the continued poverty and cultural genocide, but in these unstable economic climate, there is uncertainty with respect to Crown granted third party tenures.

Part II: Political Snapshot

New Relationship

I have been a member of a joint Recognition Working Group ("RWG"), established in 2007, to engage in discussions about implementing recognition, including to:

> "explore options for the implementation of "recognition" in the spirit of the *New Relationship*, including the Action Plan, which envisions processes and new institutions and new agreements for shared decision-making and revenue and benefit sharing."

Our discussions have centered on a legislative proposal for Recognition Legislation tabled by the Leadership Council ("FNLC"), having been mandated to advance this agenda as a tool for making systemic change. There were 10 meetings of the RWG between April and September.

While the New Relationship Vision is clear that the agreed to pathway to recognition will be through shared decision making and revenue and benefit sharing, our biggest challenge is to make the necessary systemic shifts – to facilitate shared decision making, and revenue and benefit sharing, based on title recognition.

Shared decision making is not consultation - consultation is a process of sharing information and the Crown governments collecting comments and incorporating First Nations' views in the unilateral decisions it makes. Shared decision making takes us to governance – two governments operating simultaneously and making decisions based on their respective laws and authorities.

In a post-recognition universe, the discussion shifts from proving Aboriginal/Crown titles to the rules of the jurisdictional interplay where Aboriginal laws are provided space to steward the land.

Many Indigenous scholars, including Ardith Walkem and Dr. Chief Ron Ignace, are contributing greatly to the understanding that Aboriginal laws are the true laws of the land. Ardith Walkem observed:

> [T]he land taught the people how to live upon it, that people were placed at particular areas of the land and given the laws and teachings that would help them to live peaceably and properly upon the land. In this sense, Indigenous laws and legal orders arose from and continue to be sustained by the land. This fact explains the plurality of Indigenous laws and of our need, when traveling upon the territories of other nations, to respect their laws. Indigenous Nations, who live on oceans, prairie plains, or arctic

> tundra, have need for different laws and different social organizations, because it is the goal of laws to teach people to live together with other life, and the land that supports that life.[5]

Shared decision making flows from title recognition. Making space for shared decision making will put Aboriginal laws on the land.

Revenue and benefit sharing also flows from recognition of unextinguished Aboriginal title and what the Courts have said for over one hundred years – about the limitation on provincial Crown title.

There were three core aspects to our proposal. Each of these components would move us beyond the *status quo*.

Setting the Standard of Recognition: The FNLC is trying to do something new – to turn the page on the past and to do something visionary. Given this, there is tremendous need and value for a clear statement of recognition principles to act as a guide in reconciliation efforts - to be a standard for bringing provincial legislation, policies, and negotiation mandates into alignment with the New Relationship Vision. This is what the FNLC's *Recognition Act* is intended to do. The FNLC's legislative proposal sets out a clear statement recognizing co-existing titles and jurisdictions, and provisions to "create space" for the Crown to implement shared decision making and to provide for revenue and benefit sharing. The proposal also includes provisions to interpret legislation and policies consistent with recognition.

Creating Solutions to Current Obstacles: There are a number of obstacles to honourable engagement and to shared decision making.. The FNLC's legislative proposal bring about serious steps to implement solutions to these obstacles – in particular, that this be done through an agreement between the FNLC and the Province which would be attached to, or referenced within, the *Act*. The agreement would provide for new dispute resolution mechanisms; new capacities for Nation re-building around the proper title and rights holders, and for resolving outstanding challenges of shared territory/overlaps; establishing mechanisms for information sharing and databases that

[5] Walkem, Ardith. *Bringing Water to the Land: Re-Cognize-Ing Indigenous Oral Traditions and the Laws Embodies within Them* (Vancouver: University of British Columbia (Faculty of Law) Master's Thesis. August 2005) at 78-79.

will make clear and certain the pathways to development; and a clear code of conduct that would manage and clarify expectations around Crown conduct.

Providing the Tools for New Relationships on the Ground: Government to Government agreements about land use planning, management, tenuring, and resource and benefit sharing were identified in the New Relationship vision as tangible tools for implementing the New Relationship. These arrangements have not materialized. The FNLC's legislative proposal includes "templates" that would assist First Nations and the Crown to clearly and quickly enter into strong and collaborative relationships with each other.

Interim Revenue and Benefit Sharing: A proposal was tabled by the FNLC for interim revenue sharing to occur immediately in the area of gaming, while discussions on broader revenue sharing continued.

The RWG has flushed out the Province's mandates. The Province is only prepared to legislate the *status quo* - and also seeks to preserve its legal position in the language it proposes in the section setting standards of recognition: "First Nations and the government may have different perspectives on the specific nature, extent and location of Aboriginal rights and title within B.C."

Shared Decision Making: The Province has been clear that while it is prepared to create legislative space to fulfill constitutional obligations, it is only consultation and accommodation- and not shared decision making - which the Province will make space to reform. In other words, the Province insists on recognition legislation which preserves provincial unilateralism.

The Province's negotiators have confirmed that the Action Plan of the New Relationship, which calls for the conclusion of government-to-government agreements regarding shared decision-making over land use planning, management, tenuring, as well as agreements for revenue and benefit sharing, is no longer a common objective. Rather, the Province's new tool is "strategic engagement agreements", to be negotiated at the option of the Province, with selected First Nations. These agreements are a form of land use planning, which may include the identification and protection of certain priority areas, and perhaps include the identification of management objective (such as ecosystem

based management "EBM"). Then, the Province wants to decouple this strategic engagement from management and tenuring decisions. In other words, the plan is for no true shared decision-making but, rather, is about preserving unilateral provincial decision-making for management and tenuring, while giving the Province 'consultation credit' for this strategic engagement.

The Province expressly rejected the development of templates to guide shared decision making models. Also rejected was a global solution to provide new capacity for nation re-building and for dispute resolution mechanisms, although both capacity and dispute resolution mechanisms might be included in strategic engagement agreements

Revenue Sharing: The Province's position was tabled on October 24th, 2008 and essentially equates accommodation with revenue sharing. Its proposal attaches benefits to First Nations' support for "new major projects" going forward, and then seeks to tie the monies to targeted goals to close the economic gap. The money realized would be discounted from treaty settlements. The Province's position is to require First Nations communities to enter into an "Economic Community Development Agreement" ("ECDA").

Note: Globe and Mail articles on Nov. 14, 2008 reported that B.C. received $115 million in its November auction of leases and drilling licences for new natural gas exploration. The take brings the 2008 total to $2l57 billion, well more than double the previous annual record of $1.05 billion set in 2007 – and far ahead of Alberta and Saskatchewan in revenue generated from the sale of exploration rights. These are not the kinds of revenues contemplated to be shared.

In a strong letter to the Premier, the FNLC raised the gaps in our respective visions of how to implement the New Relationship. This resulted in a meeting with the Premier where the FNLC proposed that the "recognition legislation" discussions be elevated to the highest political level. On November 28, 2008, the Premier agreed to elevate this discussion with Minister De Jong, Deputy Minister Jessica McDonald and Deputy Minister Lorne Brownsey representing the Province in political discussions with members of the FNLC. A three-day meeting will occur in December 2008.

Organizing for Share Decision-Making

There are elements of the Legislative Proposal that need to be implemented, in any event of the outcome of the Legislative Proposal.

One challenge arises from the *Indian Act* and the practical reality that shared decision-making with 203 *Indian Act* Bands may be impossible. This requires Nation-building and addressing the issue of shared territory and territorial overlaps. This will require new processes, resources and dispute resolution mechanisms. We know from case law that there is an increasing need for First Nations to address these internal issues. For example, Courts have discounted the "strength of claim" analysis due to 'overlap issues', and governments continue to 'divide and conquer', holding out the carrot of accommodation agreements to Bands, hoping to avoid or deflect the assertion by the Nation of Aboriginal stewardship laws addressing the project going forward.

The Court in *Xeni* has held that the proper rights holder are people who were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The search is not for any particular legal entity, such as a Band.

The UN Declaration on the Rights of Indigenous Peoples, as well as the "All Our Relations" Declaration, affirm that the choice of political status is an aspect of inherent rights and should be decided by First Nations. And, so, First Nations have an inherent right to choose their political structures.

However, addressing this challenge also engages the honour of the Crown. The Courts have held that the Crown must deal with the proper title and rights holder and, as the Court in *Tsilhqot'in* concluded, this is not necessarily *Indian Act* Bands. The Province's representatives at the RWG have agreed in principle that First Nations should determine the appropriate First Nations' government bodies for shared decision-making decisions.

Part III: Information Management Capacity

Another challenge to effective shared decision-making is the achievement of proper data and baseline information about the state of a First Nation's territory from a title and rights perspective. Like the issue of the proper title and rights holder, the solution to this challenge also engages the honour of the Crown. In *Tsilhqot'in*, Vickers J. placed the onus on B.C. to develop proper and sufficient baseline information (para. 1294) as a starting point for assessing the impact of any proposed government action/decision on Aboriginal title and rights, and on land and resources. More specifically, this information is required to assess, understand and accommodate cumulative impacts on Aboriginal title and rights to ensure the "continued well-being" (para. 1286) of First Nations peoples and to ensure that lands and resources are "managed to ensure a continuation of those rights" (para. 1291).

For both issues, First Nations can chart the path - who is the proper rights and title holder for your Nation, and what structures will you choose for governance? Will you pool your power to achieve a collective approach to database sharing, such as the development of a sustainable development institute, or will each First Nation negotiate their own solutions? These are some of the pressing questions, challenges, and opportunities on the path to shared decision making.

Conclusion

To achieve recognition, the Ghost must be banished, and that means that it must not continue to be fed. The "recognition legislation" proposal provides an opportunity to cut off the hand which feeds the Ghost by implementing systemic shift. There are steps within First Nations' control to take, as ghost busters, to advance this agenda.