# First Nations Leadership Council

BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS

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For Immediate release:

July 4, 2016

**An Open Letter from the First Nations Leadership Council to Premier Christy Clark regarding BC correspondence to the AME-BC regarding access payments to operate on First Nations lands**

**Coast Salish Territory (Vancouver)** — The First Nations Leadership Council today released the attached open letter to Premier Christy Clark commenting on recent correspondence between Minister John Rustad and the Association for Mineral Exploration British Columbia (AME-BC) regarding access payments to operate on First Nations lands.

Attached are copies of the following;

- June 30, 2016 FNLC letter to Premier Clark re: Correspondence from Minister John Rustad to the Association for Mineral Exploration British Columbia (AME-BC)
- June 26, 2016 letter from the Carrier Sekani Tribal Council to Premier Clark re: Correspondence from Minister John Rustad to the Association for Mineral Exploration British Columbia (AME-BC)
- June 13, 2016 letter from Minister John Rustad to Gavin Dirom, President, AME-BC
- May 19, 2016 letter from Gavin Dirom, President AME-BC to Minister John Rustad

-30-

The First Nations Leadership Council is comprised of the political executives of the BC Assembly of First Nations, First Nations Summit, and the Union of BC Indian Chiefs.

**For further comment please contact:**

| | |
|---|---|
| Grand Chief Edward John, Political Executive, First Nations Summit: | 778-772-8218 |
| Grand Chief Stewart Phillip, President, Union of BC Indian Chiefs: | 604-684-0231 |
| Regional Chief Shane Gottfriedson, BC Assembly of First Nations: | 250-852-1143 |

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June 30, 2016

Premier Christy Clark
Premier of British Columbia
Parliament Buildings
Victoria, BC
V8V 1X4

Dear Premier Clark:

**Re: Correspondence from Minister John Rustad to the Association for Mineral Exploration British Columbia (AME-BC)**

We are in receipt of a copy of a letter from the Hon. John Rustad, Minister of Aboriginal Relations and Reconciliation to Mr. Gavin Dirom, President and Chief Executive Officer of AME-BC, responding to his May 19th, 2016 letter about access payments to operate on First Nations lands.

The First Nations Leadership Council fundamentally opposes the position expressed by the Province, and any implication that First Nations are doing something illegal by governing access to their traditional territories. In fact, it is the Province's position that is contrary to the laws of Canada. It is misleading and entirely inconsistent with our mutual goals and objectives set out in our shared Commitment Document. And, to be clear, "provincial laws of authority" do not equate to "the law" of Aboriginal rights in Canada. The tone, rhetoric and message of your letter is antithetical to the fundamental goal of reconciliation and it is a great concern to us that it will only fuel conflict between industry and First Nations. This is not in anyone's best interests and will not serve to strengthen the economy.

Mr. Dirom describes a "difficult situation" of First Nations seeking access payments as part of exploration program agreements and that such payments are being "demanded without any mutual business benefits offered or quid pro quo to the mineral explorers or their suppliers or contractors."

We see in Minister Rustad's response that the Province of British Columbia takes the position that "First Nation assertion of ownership within a geographic area, and associated requests for fees to operate on Crown lands, are not consistent with provincial laws of authority" and, further, that "To be clear, the Province maintains full jurisdiction on Crown lands, and does not view First Nation governments as possessing the authority to require companies to make access payments in return for being allowed to work in their respective territories."

AME-BC has posted on its website the following message to its members:

> **What action AME is taking**
> AME does not support payments that are demanded in such circumstances and which are lacking legitimate mutual benefit. This issue must also be considered in the context of any potentially relevant anticorruption and public disclosure laws under securities regulations. As such, AME has engaged the Government of British Columbia on this serious matter and we are pleased to learn that it too does not condone such activity. The government's positon has been clearly stated in a June 13, 2016 letter (see link to BC Government letter). AME commends government for this clarity and principled position.

**What action you or your organization can take**

If you or your company has received this type of payment for access demand, we urge you to contact government authorities and inform them of the situation. Alternatively, please contact AME at info@amebc.ca and we will aggregate your confidential information and share it with government officials in an anonymous form.

The Supreme Court of Canada has commented judicially on the existence, nature and scope of Aboriginal rights, including Aboriginal title, in numerous cases. Many of the most significant cases arise out of British Columbia, including the recent declaration by the Court of existing Aboriginal title held by the *Tsilhqot'in* people.

Aboriginal title is a legal interest in the land and includes a right to exclusive use and occupation, the right to determine how the land is used and an inescapable economic component (a beneficial interest in the land). The Court was clear:

> "Aboriginal title confers on the group that holds it the exclusive *right to decide* how the land is used and the *right to benefit from those uses*." (emphasis added)

Aboriginal title is not contingent upon recognition by the court, the Crown or any third party. First Nations are not required to sit on their rights passively until someone else deems it acceptable for them to exercise their inherent rights enshrined in the Constitution. This was recently expressly affirmed by the British Columbia Court of Appeal in the *Saik'uz* decision, which also made it clear that First Nations can sue private actors in nuisance because of impacts to their Aboriginal title and rights, prior to any declaration by a Court or recognition by the Crown. These kinds of decisions underscore that our rights and title are real and cannot be dismissed as irrelevant or inconsequential.

The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982.*

There are significant implications and risks to treating First Nations' lands as Crown lands, absent of any underlying Aboriginal title. The Court clarified that, once title is established,

> it *may be necessary for the Crown to reassess prior conduct* in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, *it may be required to cancel the project* upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such *legislation may be rendered inapplicable* going forward to the extent that it unjustifiably infringes Aboriginal title. (emphasis added)

The Court was clear that, allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This speaks to the fact that the land question in British Columbia remains largely outstanding, that Aboriginal rights and title do exist, and that there are consequences to continuing on a path of denial and disregard. The Court encouraged the Crown and private actors to obtain consent of a First Nation whether or not Aboriginal title had been declared, precisely to avoid the risk, uncertainty and liability that might be incurred from acting without consent. In doing so, they were setting out a tool and path to advance reconciliation. The position in your letter not only is highly questionable given the established jurisprudence, but regresses from the critical work of reconciliation.

Importantly, there is a large body of international law and standards that also speak to the existence and protection of Indigenous human rights. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) has the unqualified endorsement of Canada and sets out minimum standards for ensuring the exercise, protection and advancement of these rights. These standards include:

> **Article 3** Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and *freely pursue their economic*, social and cultural *development*.
> **Article 4** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, *as well as ways and means for financing their autonomous functions*.
> **Article 5** Indigenous peoples have the right to *maintain and strengthen* their distinct political, legal, *economic*, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
> **Article 18** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves *in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions*.
> **Article 19** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.
> **Article 32** 1. Indigenous peoples have the *right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources*. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed *consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources*. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
> **Article 38** States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration. (emphasis added)

The Province of British Columbia is not separate or immune from the unqualified endorsement of UNDRIP by the Government of Canada. UNDRIP references “States” and their obligations throughout the text of this human rights instrument. For Canada, such obligations are to be carried out by the Crown, regardless of whether it be the Crown in right of Canada or the Crown in right of the any of the provinces. Certainly provincial governments cannot operate to undermine the country’s commitments and obligations.

Neither Mr. Dirom’s letter, nor Minister Rustad’s response, acknowledge this legal reality. Instead, there is a continuation of the tired, unwise and dishonorable position of denial on the part of the Crown, and a misguided expectation that doing business in First Nations lands is a matter of achieving “quid pro quo”.

For far too long, the Crown and industry have gone into First Nations’ territories and reaped significant economic benefits that have not been shared equitably with those First Nations, and in many cases left the lands and resources desecrated. The outstanding business of

reconciliation required under section 35 of the *Constitution Act, 1982* includes reconciling this injustice. It also includes a more respectful relationship going forward, where First Nations actively exercise their rights, the Crown fulfills its obligations, and industry fulfills its role in supporting effective and meaningful reconciliation.

The whole reason why First Nations and the Province of British Columbia have negotiated political arrangements such as the New Relationship and the more recent Commitment Document, and are engaging in treaty and other negotiations, is specifically because of this outstanding need for reconciliation and settlement of the land question. Yet, Minister Rustad's letter does not acknowledge this, or our current joint effort to develop a principled framework for reconciliation which will focus on critical issues such as those addressed in Minister Rustad's letter – ownership of lands, operation of provincial laws, operation of First Nations law and exercise of governance, and an equitable sharing of benefits derived from lands and resources. As set out in UNDRIP, treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership.

Apart from all of the clear law that contradicts your position in the letter – we must emphasize that Minister Rustad's letter is simply bad for the economy of British Columbia. Sowing division, raising tensions, and potentially interfering in important work that industry and First Nations have to do together will only have the effect of further chilling the climate for economic development, and deepen uncertainty, as First Nations increasingly exercise their legal powers against industry instead of the Crown.

The Hon. John Rustad is the Minister of Aboriginal Relations and Reconciliation. We expect him to champion progressive, respectful and constructive relationships – and not act in a manner contrary to that fundamental constitutional objective.

We would have expected a Minister charged to work with us on reconciliation to speak with us about concerns he was hearing, to seek to better understand them, and take collaborative steps that are appropriate for bringing industry and First Nations together with common purpose.

We remain committed to develop a principled framework for reconciliation that creates space for an improved relationship, and that achieves a strong economy for everyone.

Sincerely,

**FIRST NATIONS LEADERSHIP COUNCIL**

**On behalf of the FIRST NATIONS SUMMIT:**

Grand Chief Edward John | Robert Phillips | Cheryl Casimer

**On behalf of the UNION OF BC INDIAN CHIEFS:**

Grand Chief Stewart Phillip | Chief Bob Chamberlin | Chief Judy Wilson

**On behalf of the BC ASSEMBLY OF FIRST NATIONS:**

Regional Chief Shane Gottfriedson

Cc: Gavin Dirom, AME-BC
Hon. John Rustad, Minister of Aboriginal Relations and Reconciliation
Hon. Carolyn Bennett, Minister, Indigenous and Northern Affairs Canada
BC First Nations

*REPLY TO:*

☑ **PRINCE GEORGE OFFICE**

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☐ **HEAD OFFICE**

Wet'suwet'en First Nation
PO Box 760
Burns Lake, B.C.
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June 28, 2016

*Sent via E-mail*

Premier Christy Clark
PO BOX 9041 STN PROV GOVT
Victoria, B.C. V8W 9E1
E-mail: premier@gov.bc.ca

**RE: May 19, 2016 letter by AME BC to Minister Rustad and Minister Rustad's response of June 13, 2016**

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We write in response to a recent exchange of letters between Gavin Dirom of AME BC (May 19, 2016) and Minister John Rustad (June 13, 2016). Those letters refer to the issue of alleged demands by some First Nations for access payments. Both the AME BC letter and Minister Rustad's response letter raise some very serious concerns for our respective First Nations.

AME BC, as it has done in the past with Premier Campbell, once again is fear mongering by referring to unsubstantiated allegations about "*illegal*" actions taken by First Nations as "*obstructions*", "*threats*" and "*coercion*" creating little or no certainty for mineral explorers.

Likewise, notwithstanding the Province's recognition of the existence of Carrier Sekani Aboriginal title and rights in our Territories, Minister Rustad's letter purports to reduce our Aboriginal title and rights to a mere "*assertion of ownership*" which "*are not consistent with provincial laws of authority*". In particular, Minister Rustad's letter sets out his view that "*To be clear, the province maintains full jurisdiction on Crown lands and does not view First Nation governments as possessing the authority to require companies to make access payments in return for being allowed to work in their respective territories*".

Minister Rustad's position is untenable and inconsistent with his role as the Minister charged with advancing reconciliation with our Nations, our Collaboration Agreement, the rule of law, and the fundamental precepts of Aboriginal law as articulated in numerous decisions of the Supreme Court of Canada ("SCC"). Key elements of the law on Aboriginal title and rights that Canadian courts have confirmed include:

- in *Delgamuukw*, the SCC confirmed that Aboriginal title continues to exist, it is a legal interest in land, Aboriginal title holders have the legal right to make

decisions about how their lands will be used, and that Aboriginal title has an "inescapable economic component";

- in *Haida*, the SCC outlined the need for "compensation" for First Nation lands that were wrongfully taken;

- in *Tsilhqot'in*, the SCC confirmed that the components of Aboriginal title include: (i) the right to decide how the land will be used; (ii) the right of enjoyment and occupancy of the land; (iii) the right to possess the land; (iv) *the right to the economic benefits of the land*; and (v) the right to pro-actively use and manage the land; and

- in *Saik'uz*, the B.C. Court of Appeal made it clear that Carrier Sekani title exists in and to our Territories, and that we need to get on with the business of implementing it. Our title and rights continue to exist in their full form.

Moreover, the United Nations Declaration on the Rights of Indigenous Peoples, which has now been fully supported by Canada without qualification, calls for redress including restitution and compensation for our lands which have been wrongfully taken, and recognizes our right to free, prior and informed consent prior to any resource development activities occurring on our Territories. We note that B.C. is bound by Canada's international commitments under the terms of the Vienna Convention on the Law of Treaties.

Based on these legal rights, we have the full right to, and expectation that we will, benefit from the use of our lands and resources by others, including by raising revenues of all forms from all sources.

In stark contrast to Minister Rustad's recent comments, on September 11, 2015 during the meeting between B.C. Chiefs and the B.C. cabinet, you expressed B.C.'s position on Aboriginal title and reconciliation as follows:

> "*The Supreme Court of Canada has said aboriginal title exists in this country, and in my government we embrace that decision, and so now our challenge is how to translate that decision into reality for First Nations across British Columbia, how to implement it, how to meet your expectations and the expectations of all British Columbians*"; and that
>
> "*...we see title as creating opportunities to make joint decisions...in true partnership.*"

We call on you, as the Premier of British Columbia, to confirm that Minister Rustad's letter to AME is wholly inconsistent with the Province's position on Aboriginal title and rights, and to specifically refute Minister Rustad's comments.

We also request that we convene a leadership table meeting in Victoria, according to the terms of our Collaboration Agreement, the week of July 18th with you and Deputy Premier Coleman to discuss this very serious development which impacts our negotiations on forestry, and more generally on reconciliation-related matters.

Respectfully,

Terry Teegee
Carrier Sekani Tribal Council

Chief Larry Nooski
Nadleh Whut'en

Chief Fred Sam
Nak'azdli Band

Chief Archie Patrick
Stellat'en First Nation

Chief Stanley Thomas
Saik'uz First Nation

Chief Justa Monk
Tl'azt'en Nation

Chief Dan George
Burns Lake Band

Chief John Allen French
Takla Lake First Nation

c: The Honourable Rich Coleman, Deputy Premier and Minister of Natural Gas Development

The Honourable John Rustad, Minister Aboriginal Relations and Reconciliation

John Horgan, New Democratic Party

BRITISH COLUMBIA

Ref. 39359

JUN 13 2016

Gavin C. Dirom, MSc, PAg
President and Chief Executive Officer
Association for Mineral Exploration British Columbia
800 - 889 West Pender Street
Vancouver BC V6C 3B2

Dear Gavin C. Dirom:

Thank you for your letter dated May 19, 2016 regarding the concern that some First Nations are demanding access payments from proponents, tenure holders, and in some cases, their contractors and suppliers, as part of proposed exploration project agreements with First Nations. I am pleased to share the provincial view on this serious matter.

First Nation assertion of ownership within a geographic area, and associated requests for fees to operate on Crown lands, are not consistent with provincial laws of authority. To be clear, the Province maintains full jurisdiction on Crown lands, and does not view First Nation governments as possessing the authority to require companies to make access payments in return for being allowed to work in their respective territories. In addition, the Province does not support the imposition of revenue-generating processes on Crown lands and for Crown-authorized activities from any third party, and this includes First Nations.

While proponents are not required to provide funding to First Nations as part of engagement or consultation, they may choose to do so as part of business arrangements with First Nations. The responsibility for assessing the acceptability of any economic request from a First Nation rests entirely with proponents. As such, the Province will not direct that such funding be provided, nor will the Province offer advice to proponents regarding capacity funding requests from First Nations.

.../2

Ministry of
Aboriginal Relations
and Reconciliation

Office of the
Minister

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PO Box 9051 Stn Prov Govt
Victoria BC V8W 9E2
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The Province has a clear interest in continuing to foster resource development activities in all regions of British Columbia by increasing certainty on the land. The Province will continue to meet its constitutional obligations to consult and, where appropriate, accommodate potential impacts to First Nations' Aboriginal rights, title and interests for proposed developments in First Nation territories. The Province also encourages proponents to continue to engage with First Nations early and often, with the objective of establishing mutually beneficial working relationships.

Should you wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

John Rustad
Minister

May 19, 2016

Hon. John Rustad
Minister of Aboriginal Relations and Reconciliation
PO Box 9051, Stn Prov Govt
Room 323, Parliament Buildings
Victoria, BC
V8V 9E2

*Sent by email to: John.Rustad.MLA@leg.bc.ca; ABR.Minister@gov.bc.ca*

Dear Minister Rustad,

**RE: Demands by Some First Nations for Access Payments**

On behalf of the Association for Mineral Exploration British Columbia (AME), I am writing to you to express the difficult situation of 'access payments' being demanded as part of exploration project agreements between mineral exploration companies and some First Nations in BC, as well as demands for payments from the suppliers or contractors to the mineral exploration companies. These demands for access payments are occurring in at least 4 separate regions of northern British Columbia. It appears that payments are being demanded without any mutual business benefits offered or quid pro quo to the mineral explorers or their suppliers or contractors. To be clear, as leaders in promoting and building positive and respectful aboriginal engagement and reconciliation, AME is fully supportive of mutually beneficial agreements being negotiated between First Nations and mineral exploration and development companies.

We would very much appreciate knowing government's position on whether, in its view, First Nations have the authority to require companies to make such access payments, and also to request government to clearly state its positon publically so that we can share it with our members.

The magnitude of the fees demanded can be significant (many tens of thousands of dollars), and are usually accompanied by a statement that if the company does not pay then the exploration work program will be at risk from some form of interference or obstruction (usually a reference to a blockade). In almost all cases, the demand for payment is not in relation to a positive and early engagement approach or obligation that an exploration company has established through sound business practices, proactive agreements or the government permitting process, but rather it is simply a demand for a payment to 'operate in the territory'.

In the case of mineral exploration companies, the common demand is to pay the First Nation a fixed percentage of the total exploration program budget. Whereas, in the case of suppliers or contractors, the demand is typically for some percentage of the gross billing of a supplier, without any consideration or provision of a service in return. In the case of overlapping asserted territory by multiple First Nations,

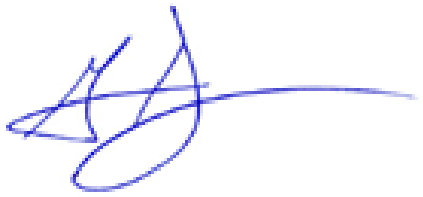
each of the First Nations (and in some case each 'House' of a First Nation) is demanding payments. There is little to no certainty provided to mineral explorers that their exploration programs will be "allowed" to move forward without obstruction, or receiving threats of obstruction. It is a very real and terribly uncomfortable position to be coerced into paying access fees or signing agreements under such pressured conditions.

If this demand for access payment situation continues unabated, mineral exploration in BC will become much less attractive to global investors and explorers.

We do not know on what legal basis these First Nations can demand such payments within the territories they claim. We believe that the Government of British Columbia needs to clearly and firmly express to the First Nations who are demanding such access payments that they are doing so illegally, and that they are acting well outside the bounds of internationally accepted good business practices and laws. Proactive and mutually beneficial business opportunities with industry, as well as negotiations with the Province, are being put at risk by First Nations demanding such access payments.

If you have any questions, please feel free to contact me at 778.233.6459, 604.630.3920 or gdirom@amebc.ca.

Yours truly,



Gavin C. Dirom, M.Sc., P.Ag.
President & Chief Executive Officer
Association for Mineral Exploration British Columbia

cc: Honourable Christy Clark, Premier of British Columbia
Honourable Bill Bennett, Minister of Energy and Mines
Honourable Richard Coleman, Minister of Natural Gas Development
Honourable Steve Thomson, Minister of Forests, Lands and Natural Resources Operations
Honourable Mary Polak, Minister of Environment
Honourable Suzanne Anton, Minister of Justice and Attorney General
Honourable Mike Morris, Minister of Public Safety and Solicitor General
Board of Directors, AME BC