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March 12, 2010

First Nations Health Council
c/o the First Nations Health Society
1205-100 Park Royal South
West Vancouver, BC
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Attention: Joe Gallagher, Chief Executive Officer

Dear Sirs and Mesdames:

Re: Basis Agreement

We have been asked to provide an opinion to the First Nations Health Council (“**FNHC**”) on the legal significance of the British Columbia Tripartite First Nations Health Basis for a Framework Agreement on Health Governance (the “**Basis Agreement**”) negotiated between the First Nations Health Council (representing BC First Nations), the Federal Government of Canada (“**Federal Government**”) and the Province of British Columbia (the “**Province**”) (collectively the “**Parties**”).

We have been specifically asked to address the following questions:

1. Would the Basis Agreement, if ratified, legally bind BC First Nations to the principles, concepts and arrangements addressed within it?
2. Does the Basis Agreement alter the Federal fiduciary obligation to BC First Nations or suggest that the FNHC will be exercising First Nations jurisdiction over health?
3. The Basis Agreement is to be “initialled” by the parties, what is the legal significance of “initialling” the Basis Agreement? Does this legally bind BC First Nations to the content of the agreement?
4. Is the question of whether the First Nations Interim Health Governance Committee Co-Chair has the ability to initial the Basis Agreement a legal or political matter?

5. Does initialling the Basis Agreement limit, obstruct, impede or constrain the negotiations that interested First Nations may want to pursue with the Federal or Provincial governments themselves?

BACKGROUND:

The Basis Agreement is a tripartite document negotiated by the Province, the Federal Government and the FNHC that identifies the Parties' intentions regarding the creation of a new arrangement for the delivery of health care services and programs to BC First Nations.

There are recurring references throughout the Basis Agreement which make clear that the Agreement is intended as a preliminary statement of intent, which shall not become legally binding on the Parties. The Basis Agreement also contains a lengthy "No Prejudice" statement which makes clear that it is not intended to affect existing Aboriginal, Treaty, Constitutional, self government or other rights vesting in BC First Nations.

The Basis Agreement explains that it is intended only as a preliminary non-binding document that identifies the basis upon which the Parties *may* be prepared to negotiate a more formal binding Framework Agreement. In this sense, it can be viewed as advancing the objectives set out in the 2007 Tripartite First Nations Health Plan by adding clarity and detail as to how a First Nations led arrangement for the delivery of health services and programs might be structured and implemented.

The purpose of the Basis Agreement can be characterized as providing a detailed statement of the issues, structure, funding formula and implementation plans for a new health care arrangement for First Nations so that each of the Parties can make an informed choice as to whether they, in fact, wish to pursue the negotiation of a binding Framework Agreement.

The conclusion of the Basis Agreement negotiations is signalled by the initialling of the document by each of the lead negotiators. Following the conclusion of this process, the Basis Agreement anticipates that each of the negotiators will seek to obtain the necessary approvals for the conclusion of a Framework Agreement. It does not obligate any Party to proceed with such negotiations. The Agreement also contemplates that, before the FNHC moves forward with a Framework Agreement, it will engage in a ratification process with BC First Nations.

DISCUSSION

Below we have set out our responses to each of the five questions set out above.

- 1. Would the Basis Agreement, if ratified, legally bind BC First Nations to the principles, concepts and arrangements addressed within it?*

Whether or not it is ratified, it is clear on the face of the Basis Agreement that it is not intended to be a final or binding document on any of the Parties. This document is best characterized as merely an “expression of intention” as between the Parties. It confirms their commitment to work together toward the development of a subsequent Framework Agreement, but does not legally obligate the Parties to enter into or complete the negotiation of such an agreement.

Indeed, we note that section 12 of the Basis Agreement provides that:

[T]his Basis Agreement and for greater certainty any of its provisions are not legally binding on any of the Parties and are without prejudice to the respective legal positions of the Parties.

Likewise, at section 2.1, the Agreement discusses its purposes and confirms that this agreement is only intended to form “*the foundation for the negotiation*” of a Framework Agreement to be subsequently negotiated by the Parties. In fact, many of the Agreement’s provisions are clear in setting out merely the basis and principles upon which the Parties agree to negotiate in the future.

It is a fundamental contractual principle that an agreement to make a future agreement is not enforceable. Even if the parties have identified the terms upon which a later contract will be made, an agreement to agree will not be enforced by the courts. On that basis, it is our view that the Basis Agreement, while it may commit the Parties to certain political statements of intent, does not legally bind any of the Parties.

As set out above, the stated purpose of the Basis Agreement is to articulate the principles and arrangements upon which the Parties may be prepared to negotiate. As we understand it, the purpose of doing so is to permit all of the Parties to make an informed assessment of whether to proceed with the negotiation of a Framework Agreement. However, it does not oblige them to proceed to this step.

2. Does the Basis Agreement alter the Federal fiduciary obligation to BC First Nations or suggest that the First Nations Health Authority contemplated in the Basis Agreement will be exercising First Nations’ jurisdiction over health?

The Basis Agreement provides expressly that it does not end or alter the fiduciary obligations of the Crown for First Nations, and it expressly recognizes the authority of First Nations over the design and delivery of health services at a community level. It also clearly states that it is not intended to affect any inherent right of self-government vesting in any First Nation, whether with respect to health or otherwise. As set out above, the Agreement is not binding, and therefore does not alter any existing, or confer new, rights on any of the Parties.

Specifically, section 2.4(c) of the Basis Agreement provides that neither the Basis Agreement or the Framework Agreement is intended to have the effect of, or be interpreted as, “*ending or*

altering the evolving fiduciary relationship between the Crown and BC First Nations". In fact, the Basis Agreement goes on to state at section 2.4(d) that neither the Basis Agreement or Framework Agreement are intended to alter any responsibilities of the federal and provincial governments for First Nations health (except to the extent that the means of discharging those responsibilities may change under any subsequent Framework Agreement that may be concluded).

The Supreme Court of Canada has stated that the content of a party's fiduciary obligations may, in appropriate cases, change with the circumstances. As a non-binding agreement, however, the Basis Agreement could not be said to itself constitute such an altering circumstance. Indeed, the Basis Agreement goes further by stating that it is expressly "without prejudice" to the Parties' respective legal positions.

Likewise, the Basis Agreement does not include any provisions suggesting that its effect is to usurp or assume the First Nations' own jurisdiction or authority over health. Rather, section 2.2(b) of the Basis Agreement specifically recognizes the continuing authority of First Nations to design and deliver health services for their own communities. And, section 2.4 of the Basis Agreement makes clear that it is not intended to prejudice any inherent rights of self government vesting in BC First Nations or agreements negotiated with respect to such self government rights.

3. The Basis Agreement is to be "initialled" by the parties, what is the legal significance of "initialling" the Basis Agreement? Does this legally bind BC First Nations to the content of the agreement?

Section 12 of the Basis Agreement provides that the lead negotiators for each of the Parties will initial the Basis Agreement. The process of initialling this Basis Agreement does not alter its non-binding nature. In our view, the act of initialling this document merely concludes and confirms the finalization of the text of the Basis Agreement. Once that initialling process has been completed, the Basis Agreement also contemplates that the Parties will undertake an approval and ratification process before any Framework Agreement can be concluded or become effective.

In particular, for the Federal Government and the Province, the "initialling" of the Basis Agreement triggers an obligation by the negotiators to make a "recommendation" to their Principals seeking authority to conclude a Framework Agreement based on the Basis Agreement. This makes clear that the initialling process does not commit either of the Province or the Federal Government to proceed.

Likewise, for the First Nations, the Basis Agreement contemplates both an approval and ratification process. In particular:

- The Basis Agreement indicates that the First Nations negotiators will seek resolutions from the three (3) First Nations political organizations (BC Assembly of First Nations, the First Nations Summit and the Union of BC Indian Chiefs) to “conclude” a Framework Agreement. It is unclear what the word “conclude” means in this provision, but, in the context, it is our view that it must mean that these resolutions would support the FNHC in moving forward with the negotiation of a binding Framework Agreement.
- As a second step, the Basis Agreement contemplates that the Framework Agreement will, itself, be the subject of a Nation-based ratification process. Again, the language in this provision is somewhat unclear, but the intent appears to be that this ratification process would follow the negotiation of the Framework Agreement. The Basis Agreement states:

Following a Framework Agreement, BC First Nations will participate in a nation-based ratification process for the governance structure, functions, and relationships of a new First Nations health governance structure. This process will likely require consensus through resolutions from Tribal Councils and independent First Nations.

Finally, as previously mentioned, section 12 of the Basis Agreement (which sets out the “initialling” process) concludes with the statement that the Basis Agreement is not “*legally binding on any of the Parties*”.

4. Is the question of whether the First Nations Interim Health Governance Committee Co-Chairs have the ability to initial the Basis Agreement a legal or political matter?

Ordinarily, the question of who should sign a legal document as a representative of an organization is both a political and a legal question. There may be political reasons why particular individuals are preferred as signatories, but as a legal matter those individuals must have the actual authority to bind the organization. Since this is a non-binding agreement, the question of who has the authority to bind the FNHC or First Nations is not the concern.

Rather, in this case, the issue of who initials the Basis Agreement is dictated by the agreement itself. It provides that the “lead negotiators” of each of the Parties will initial the Agreement. We understand the First Nations Interim Health Governance Committee Co-Chairs were the lead negotiators for First Nations, and they are therefore identified by the Basis Agreement as the appropriate parties to initial it. We are not privy to the reasons why the Basis Agreement was drafted in this way, but, as a practical matter, the initialling of the Basis Agreement merely confirms that the version of the Basis Agreement initialled is the final text and that the negotiations have concluded. For that reason, the lead negotiators are the appropriate parties to provide that confirmation.

5. Does initialling the Basis Agreement limit, obstruct, impede or constrain the negotiations that interested First Nations may want to pursue with the Federal or Provincial governments themselves?

As set out above, the Basis Agreement is a non-legally binding document that is a preliminary step to the contemplated negotiation of a more comprehensive binding Framework Agreement. It does not bind any First Nation, and does not legally limit, obstruct, impede or constrain any negotiations that interested First Nations may wish to pursue with the Federal or Provincial governments independently of the Basis Agreement.

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We hope the foregoing is responsive to your questions. Please do not hesitate to contact us if we can be of further assistance.

Yours truly,

DAVIS LLP

Per:



Suzanne M. Kennedy
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