TO: The Oil and Gas Producing First Nations

FROM: D. Rae

DATE: May 13, 2009

RE: Bill C-5, a Trojan Horse?

Whenever new legislation is introduced in regard to First Nations or aboriginal interests, the inevitable question asked is what the new legislation will do to the existing fiduciary and trust obligations of Her Majesty. The recent introduction of Bill C-5, an Act to amend the Indian Oil and Gas Act, and the debate surrounding the bill, may be instructive as to the policy initiatives of the present government underlying new legislation concerning First Nations. The bill has been promoted as an effort to modernize the regime governing oil and gas operations on Indian reserve lands. However, we believe there may be ulterior motives behind the bill.

When Bill C-5 was introduced at committee stage to the House of Commons Standing Committee on Aboriginal Affairs, the Minister of Indian Affairs and Northern Development, the Hon. Chuck Strahl, had this to say to the Committee:

> "I want to clarify, however, that Bill C-5 does not give over any jurisdictional authority whatsoever to the provinces, nor will Bill C-5 have any impact whatsoever on the Crown's fiduciary responsibilities, aboriginal or treaty rights. In fact, the proposed changes will strengthen Indian Oil and Gas Canada's legislative and regulatory capacity. This will actually increase its ability to fulfill the Crown's fiduciary and statutory obligations related to the management of oil and gas resources on first nation lands."[i]

When he introduced the debate on Bill C-5 at third reading in the House of Commons, the Parliamentary Secretary to the Minister, Hon. John Duncan, stated:

> "The incorporation by reference [of provincial laws] of these amendments would ensure the federal regime would keep pace. More to the point, it would eliminate disparities between on and off-reserve lands. Again, this would provide greater certainty for potential investors and facilitate economic development. **All of this would be done while, in all circumstances, fully maintaining the federal government's fiduciary responsibilities to first nations.**
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> ...
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> [In his proposed letter of comfort to First Nations] The minister reiterated that it was the Government of Canada and not provincial authorities that would be responsible for managing first nation lands and resources.
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> ...
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> Regarding the issue of Canada's fiduciary obligations, **the federal government**

> **has committed that the fiduciary relationship will not diminish** and will continue unchanged. In fact, the proposed changes actually strengthen Canada's ability to express its fiduciary obligations because of the clarity in the bill in terms of specific legislative and regulatory capacity, so that will allow us to fulfill our role much more efficiently.
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> **The aboriginal and treaty rights of first nations are clearly unaffected by the provisions of the bill.** They remain the same." (emphasis added)[ii]

At first blush it appears that the existing fiduciary obligations of the Crown, whatever they may be, are not intended to be affected by Bill C-5 and the various provisions within the bill, such as the delegation of regulatory authority to provincial bodies. However, in spite of these words from the Minister and the Parliamentary Secretary, the following proposed amendment, which was on the Order Paper prior to third reading in the House of Commons, was ruled out of order by the Speaker:

> "In respect of an act or omission occurring in the exercise of a power or the performance of a duty by a provincial official or body under laws of a province that are incorporated by the regulations, the applicable trust or fiduciary obligations of the Minister to first nations will continue as though the Minister has exercised a like power or performed a like duty."[iii]

The question has to be asked, on what basis did the Speaker rule this amendment out of order? The amendment appears innocuous and at worst (best?), simply reiterates the status quo. It seems that if the Minister and the Parliamentary Secretary were to be taken at their words, the amendment could not have been and would not have been ruled out of order. No reasons were given by the Speaker as to why she ruled the amendment out of order.

Under the arcane rules of Parliamentary procedure the Speaker must have been advised that the amendment was at odds with the parameters of Bill C-5 as originally approved by Cabinet.[iv] Given this, some troubling conclusions arise.

The Memorandum to Cabinet which resulted in Cabinet's approval of Bill C-5 must have represented or at least suggested that Canada's fiduciary obligations would in fact be affected by the passage of Bill C-5, perhaps specifically in regard to the delegation to provincial authorities. The Memorandum to Cabinet may even have represented that the passage of Bill C-5 would result in a reduction of the fiduciary obligations of Canada to oil and gas producing First Nations or a reduction in federal expenditures to First Nations arising from these fiduciary obligations.

When paid to Canada by oil and gas producers, First Nations' royalty moneys are mixed in with Canada's own moneys in the Consolidated Revenue Fund. As such, they become "public moneys" to the same extent that taxes paid to the Receiver General are "public moneys". So any reduction in the payment of First Nations' own royalty moneys back to the First Nations actually constitutes a reduction in public expenditures. It is therefore difficult to distinguish between a true public expenditure made to a First Nation and a

payment to that same First Nation of its own royalty moneys that Canada has been holding on its behalf.

We can only speculate in regard to any possible effect of the proposed fiduciary duty amendment on the Government's public expenditures, but we do know that the proposed amendment was somehow at odds with the Government's intent for Bill C-5 and as such was ruled out of order.

So in spite of statements to the contrary in the House of Commons, our only conclusion is that the Government of Canada does indeed intend to attempt to reduce its fiduciary obligations to First Nations through legislative means, in this case, the *Indian Oil and Gas Act* and the Regulations to be passed thereunder.

Bill C-5 would create a framework statute under which most of the substance of the legislation is contained within the Regulations passed pursuant to the Act. **Given the above characterization of proposed amendments, we predict that these Regulations will attempt, to what degree we do not know, a diminution of federal responsibilities to First Nations who have oil and gas resources on their reserve lands**.

This interpretation of Bill C-5 is also consistent with the recent Supreme Court of Canada ruling in *Ermineskin v. The Queen* in which a unanimous Court held that Canada, in certain circumstances, is able to unilaterally reduce its trust and fiduciary obligations to First Nations.[v] Since Canada can unilaterally change and even reduce the interest it pays on First Nations' royalty moneys, it would seem quite possible that Canada can similarly unilaterally reduce the actual royalty rates applicable to oil and gas production from Indian reserve lands.

One could speculate that Bill C-5 may also be an attempt by Canada to force a sharing of the resource rents from Indian reserve oil and gas production (rents, royalties, bonuses, etc.) with the senior levels of government, something that to date the federal government and the provinces have found it difficult to do, both politically and legally.

Again, to quote from the Parliamentary Secretary at Third Reading in the House of Commons:

> "These assurances reinforce our government's determination to ensure first nations **share equally** in our country's prosperity.
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> ...
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> By endorsing Bill C-5, we will be confirming, once again, that collaboration and partnership between the federal government, the private sector and aboriginal people can lead to a better future. Indeed, **it will help build a better country for us all**."[vi]

Then in the hearings on Bill C-5 before the Senate Committee on Aboriginal Peoples, both the Minister and his Parliamentary Secretary chose not to answer questions as to whether it is the intent of the Government to take a share of the royalties paid on First

Nations' lands.

Up until now First Nations have realized a good portion of the economic rents from oil and gas produced from their reserve lands. This result has arisen primarily due to the assertion by First Nations of certain treaty and aboriginal rights to their reserve lands. Reserve lands traditionally have been inviolate from taxation by the federal and provincial governments. The best example of this is section 87 of the *Indian Act*, a provision that may now be at risk of being circumvented due to the *Ermineskin* decision.[vii] The Parliamentary Secretary's quote may have served notice that Canada intends to appropriate for itself a greater share of the economic rents from oil and gas produced from First Nations lands.

In the background materials to Bill C-5 one of the primary purposes of the bill is to ensure a "level playing field" with provincial regimes.[viii] This level playing field may extend to consistency in the fiscal regimes governing oil and gas exploration and production. It may portend a move to make Indian royalty regimes identical to provincial royalty regimes. Not unnaturally, industry complains when Indian royalty rates are higher than or simply calculated differently from, comparable provincial rates.

Further evidence that the door has been opened to provincial taxation and other provincial fiscal measures is provided by section 4.2(6) of Bill C-5 which provides as follows:

> Unless otherwise provided by the regulations, moneys collected by a provincial official or body under laws of a province that are incorporated by the regulations are not Indian moneys for the purposes of the *Indian Act* or public money for the pruposes of the *Financial Administration Act*.[ix]

Obviously, if these moneys are not "Indian moneys", there is no obligation on the province to pay these amounts to the First Nation concerned. This appears to be an offer of a revenue source from Canada to the provinces.

Admittedly, much of the evidence listed above is circumstantial, but the categorical refusal to include in the bill any reiteration of fiduciary obligations to First Nations is clear evidence that the bill is seeking fundamental changes to the present legal regime.

The Government of Canada takes the position, contrary to popular conception, that Indian royalties are "public moneys". While they may be "Indian moneys" under the Indian Act, these royalties are paid to the Receiver General. They are not held on deposit, but rather Canada pays interest at an imputed rate on these moneys until such time as the principal and interest amounts are paid to the beneficiary First Nation (which usually is a number of years later). Canada has always reserved the right to tax these moneys, notwithstanding section 87 of the *Indian Act* or any assertions of treaty or aboriginal rights to a tax exemption.[x]

The Bill C-5 debate at committee stage and in the House of Commons referred to "compromises" having been made. One of these compromises may be a "compromise" by First Nations that their resource rents from now on will be shared with the federal and

provincial governments. In Bill C-5 Canada may have served notice that it wants a share of these economic rents from Indian reserve lands. This would bring Indian reserve lands south of 60 in line with modern land claim agreements in the North and in British Columbia -- resource rents are to be shared and do not belong solely to the First Nation or aboriginal government. In this regard Bill C-5 echoes the original intent of the *Indian Oil and Gas Act* in 1974 before it was amended at the last minute.[xi]

The *Ermineskin* decision has opened the door to such a legislative diminution of aboriginal rights and the sharing (unilateral appropriation?) of resource rents from reserve lands. The "trust" obligations in regard to oil and gas produced from Indian reserve lands can now be altered by legislation.[xii] Bill C-5 intends to go through the door that the Supreme Court has opened.

In some respects this "sharing" of resource rents from oil and gas production on Indian reserve lands is not new. During the era of regulated oil pricing from 1973 to 1986 Canada and the provinces, by paying to First Nations a royalty on the lower, domestic Canadian price and then reserving to the senior governments 100% of the value represented by the difference between the Canadian domestic price of oil and the world price of oil, Canada and the provinces realized the lion's share of the increased value of First Nations' oil as the world oil price skyrocketed. While of questionable legal validity, this appropriation of First Nations' resource rents has never been successfully challenged.

This desire by the Government of Canada to initiate a totally new regime may also help to explain Canada's insistence on bringing in a new *Indian Oil and Gas Act* rather than simply updating the Regulations under the existing Act. In comparing Bill C-5 with the existing Act it is difficult to ascertain what Regulations proposed under the new Act could not already be made under the existing Act. Since the original Act was passed in 1974 there are no reported instances of Regulations passed under that Act being successfully challenged.

Public servants in Ottawa have never been comfortable with Canada's federal system which gives economic rents from land and natural resources to the provinces rather than to the federal government. Ottawa feels that resource rents, at least in part, should go to the central government for redistribution on a national basis. From Ottawa's perspective, local governments, be they provinces or individual First Nations, should not have an unfettered claim to 100% of these resource rents.

This was Ottawa's position in the 1970's and 1980's oil pricing wars and continues today with Canada's refusal to give full resource rents to the governments of the Yukon, Northwest Territories and Nunavut or to First Nations' governments as part of modern land claims agreements. It arose in the debate surrounding the original *Indian Oil and Gas Act* in 1974 and the same underlying premise appears to be part of Bill C-5. Bill C-5 may thus be an attempt to hinder, not help, First Nations in maximizing the returns from their oil and gas resources.

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[i] Proceedings of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Tuesday, March 3, 2009.

[ii] Hansard, Thursday, April 2, 2009.

[iii] Order Paper for the House of Commons, Friday, March 13, 2009.

[iv] The Speaker may have felt that the amendment would create a financial obligation for the Crown that the Memorandum to Cabinet (the Royal Recommendation) did not provide for. This interpretation is difficult to accept since the proposed amendment does not purport to create any new obligations, but only reiterates existing obligations.
As well, moneys cannot leave the Consolidated Revenue Fund, including "Indian moneys", without a Royal Recommendation and it appears that Bill C-5 has not provided for any payments to First Nations, even payments of their own moneys. The Government may be taking the position that changes in this regard must be by way of amendment to the *Financial Administration Act*, not the *Indian Oil and Gas Act*. If the Government is saying that its fiduciary obligations in regard to oil and gas on reserve lands that are protected under the *Constitution Act* stem only from the *Financial Administration Act* and from no other legislative source, this may be consistent with the Supreme Court's decision in *Ermineskin*.

[v] Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9.

[vi] Supra ii.

[vii] Section 87 reads,
"87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal and Statistical Management Act, the following property is exempt from taxation:
(a) the interest of an Indian or a band in reserve lands or surrendered lands; and
(b) the personal property of an Indian or a band situated on a reserve.
Idem
(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
Idem
(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.
R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150."

[viii] Legislative Summary to Bill C-5.

[ix] As an example of the potential magnitude of this provision, on April 2, 2009, Suncor was fined $850,000.00 for violations of Alberta's environmental laws.

[x] Position of Canada Revenue Agency as expressed to those First Nations seeking to take their capital and revenue funds out of the Consolidated Revenue Fund.

[xi] In 1974 the National Indian Brotherhood, the predecessor to the Assembly of First Nations, was advocating a sharing of oil and gas royalties from Indian reserve lands among all First Nations. An amendment from the then Opposition Conservative Party resulted in an amendment to the *Indian Oil and Gas Act* to the effect that royalties would be paid to Canada "in trust" for the Indian band concerned.

[xii] Supra v at paragraph 75 per Rothstein, J.: "As I have indicated, legislation may limit the discretion and actions of a fiduciary, whether that fiduciary is the Crown or anyone else."