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September 25, 2009

Delta Mayor and Council
4500 Clarence Taylor Crescent
Delta, B.C. V4K 3E2

***** BY FAX @ (604) 946-6055 AND MAIL *****

Dear Sirs/Mesdames:

Re: Burns Bog and the South Fraser Perimeter Road
Re Davis LLP Opinion

It has been brought to my attention that in response to my letter, dated August 19th, 2009, your staff commissioned a legal opinion by Davis LLP, dated September 8, 2009 (the "Davis Opinion"), which is available on your website. The Davis Opinion concludes that my views are "not supported by the law and are simply wrong."

I was initially reluctant to go to the trouble of responding to the Davis Opinion, as I'm not entirely sure that this type of back and forth is likely to be useful. However, I have been encouraged by the Burns Bog Conservation Society to respond, and I will make a few further comments.

First, assuming that Delta Council does wish to protect Burns Bog, I think that the Corporation of Delta's money would have been better spent getting a legal opinion on what its options are to protect Burns Bog, rather than an opinion attacking my opinion. Davis LLP might still reach the conclusion that the Agreements cannot be used in the way I suggest, but Council would then at least have had the benefit of recommendations of what, if anything, Davis LLP feel could be done instead. If Davis LLP feels that there is nothing that can be done to protect the Bog from threats, they could at least make recommendations about what steps should be taken to ensure protection in the future. The Davis Opinion does none of this.

Second, despite the blanket statement in the introduction to the Davis Opinion that my conclusions are "not supported by the law and are simply wrong", the Davis Opinion goes on to acknowledge that I am correct that the dispute resolution provisions of the Management Agreement could be invoked by Delta to address concerns about the SFPR,[1] although they question the utility of doing so.[2] This is contrary to the

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1 Davis Opinion, p. 10. The Davis Opinion spends some time discrediting what they say was my suggestion that Delta can force the other parties to mediate. I think read in context my Opinion is clear that my focus was on invoking the "dispute resolution process", which begins with a face to face meeting of the parties and good faith efforts to resolve the dispute, and ends with more formal mediation. Davis LLP is correct that Delta could only require a face to face meeting, and that proceeding to mediation would require the agreement of the parties. To the extent that my Opinion implied otherwise, I apologize for my lack of clarity. That being said, one would assume that parties who are trying "reasonably and in good faith" to resolve a dispute (as per Section 5.02 of the Management Agreement) would agree to mediation as a means to advancing that goal. Davis LLP seems to presume a lack of willingness to resolve Delta's concerns on the part of the Province.

2 Why bringing the parties to talk about issues of mutual concern could ever be considered counter productive is never explained in the Davis Opinion. Even were the Province to maintain that there was no legal obligation under the Agreements to address Delta's concerns, the parties would still have the option in their face to face meeting of discussing

advice given to Council on October 14, 2008,[3] and was a central point of my Opinion. Whether or not I am correct that the Dispute Resolution provisions of the Covenant could also be used becomes somewhat irrelevant in view of Davis LLP's acceptance that the Management Agreement provisions could be used.

Third, you now have two opinions reaching contradictory results on whether the Agreements are intended to protect the Protected Lands from actions taking place outside those lands. This is because the Agreement is ambiguous as to what they were intended to cover. The Davis Opinion referred you to sections of the Agreements that support a narrow interpretation, while I referred you to other sections that support a broader interpretation. Ultimately it is just this type of uncertainty which should be resolved through dispute resolution or, if necessary, the courts. Indeed, dispute resolution provisions are generally put in agreements to deal with issues of ambiguity or a lack of clarity in the original agreement.

Indeed, I was struck in reading the Davis Opinion the absurdity of lawyers (myself included) confidently expressing their views on what the intent of the parties was in a clearly ambiguous agreement,[4] when the parties had specifically agreed on a dispute resolution process to address any question as to the meaning of the Agreements.[5]

Finally, despite the irony of yet again expressing an opinion on the intent of the parties in the Agreements after just having said that the parties should work it out for themselves, I would like to comment a bit further on the reasons for believing that the Bog does and should have legal protection from off-site activities.

The Davis Opinion interprets the Agreements as if they were a typical private agreement. In actual fact, the Protected Lands were purchased by four levels of government, after a massive public outcry, and with various public assurances that the Bog would be protected. The lands were purchased at considerable expense by all four levels of government in order to preserve the Bog and its ecological features. This is reflected in the Agreements, and in the Memorandum of Understanding, all of which especially recognize the importance of the hydrology of the Bog.

Imagine, for a moment, that after engaging in the purchase of the Bog lands the province of British Columbia were to engage in a massive exercise of bad faith and install a massive pump immediately adjacent to the lands with the aim of draining the bog (perhaps for a legitimate public purpose, such as providing irrigation for nearby farms). Through such an action the province would undermine the entire purpose of the massive expenditure of public funds to acquire these lands.

According to the Davis Opinion, none of the other levels of government would have any recourse.

The current scenario is less dramatic, of course, but I cannot think that it was the intention of the parties in purchasing the Protected Lands, that one party could unilaterally turn around and compromise the functioning of the Bog. In my opinion, a court, faced with such a situation, would hold that the broad

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additional voluntary protections for the Bog. Moreover, Delta's invocation of the Dispute Resolution provisions could clearly have political benefits not considered by the Davis Opinion.

[3] Technically the October advice was that the Dispute Resolution provisions under the Covenant could not be invoked, which is consistent with the Davis Opinion. However, while that advice may be technically consistent with what Davis LLP says is the law, it was at least hugely misleading and incomplete, in that it ignored another clearly applicable agreement (the Management Agreement), negotiated alongside the Covenant, which was also intended to protect the Bog lands.

[4] I agree with the Davis Opinion that there is nothing explicit in the Agreements stating that it applies to off-site activities and their impacts on the bog. However, there are broad statements of the obligations of the parties which would, on their face, apply to such activities, and there is nothing explicit in the Agreements limiting those broad statements to activities taking place on the Protected Lands themselves.

[5] The Davis Opinion appears to sometimes confuse mediation with arbitration or some more binding process. Mediation is simply discussion between the parties with the assistance of a third party. Thus it is not necessary, as suggested at p. 7 of the Davis Opinion, to "advance an argument before a mediator … that Section 2.01 of the Management Agreement is to apply to the activities of the Parties outside the Bog." A mediator would not rule on such a question, but would assist the parties in deciding what they intended in entering into the Management Agreement.

language in the Agreements was intended to apply to such a situation[6] and/or that the four levels of government owe each other and/or the public some trust-like obligation not to destroy the Bog.[7]

Viewed from another perspective, if Delta were to seek to enforce its environmental interests in the Bog not through the Agreements or an associated trust, but through a common law action against the province for negatively affecting the hydrology of its lands,[8] I have little doubt that the lawyers for the province would argue that Delta could not bring such an action without first attempting to invoke the Dispute Resolution provisions of the Agreements, and I think a court would likely be persuaded by such an argument. Consequently, a cautious interpretation of the Agreements would hold that they are intended to address the actions of the parties generally, including those taking place outside the Bog lands.

The actions Delta takes next depends largely on what your current objectives are in relation to the Bog. If Council feels that the SFPR should be allowed to proceed, then you should say so, even if it may be tempting to hide behind the Davis Opinion and claim that there is nothing that you can do. If, however, you wish to register your objections to the impacts of the SFPR on the Bog, then even the Davis Opinion acknowledges that you may do so under the Dispute Resolution Provisions of the Management Agreement.

Sincerely,

Andrew Gage
Staff Lawyer

cc. Burns Bog Conservation Society (by e-mail only)

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6 Whether or not it is the Management Agreement or the Covenant that applies, or both, is largely irrelevant. While acknowledging that the Davis Opinion does provide some interesting arguments about why the covenant should be interpreted more narrowly, I would continue to assert that both Agreements should be interpreted in light of the broad public conservation purpose inherent in the purchase of the Bog. Authority that a covenant may prevent actions that take place outside a covenanted area may be found in a case which concerned Burns Bog: *B.C. Gas Utility v. Alpha Manufacturing et al.*, 1998 CarswellBC 883 (S.C.), overturned on appeal in respect of one defendant only, and without ruling on the merits, at 2004 CarswellBC 2224 (C.A.). In that case a statutory right of way, and associated covenant, contained language preventing the land owner from doing anything to interfere with the rights of the plaintiff gas company. The dumping of landfill outside the right of way area in such a way that compaction and displacement took place within the right of way area was held to violate the covenant. I acknowledge that the current case is different again, in that the actions complained of occur outside both the covenanted area and the properties on which the covenant agreement is registered. However, I would suggest that the principle is the same.

7 For legal authority that the purchase of land for park purposes may result in the creation of a charitable trust to the public, see *Save Our Waterfront Parks Society v. Vancouver (City)* 2004, 28 B.C.L.R. (4th) 142 (S.C.). For discussion of the public rights and/or trust-like obligations created by the dedication of land for public purposes, see my paper on the subject: A. Gage. *Highways, Parks and the Public Trust Doctrine*, 18 J.E.L.P. 1 (2007).

8 I am not here expressing an opinion as to the likelihood of success in such a case which would, I acknowledge, be complex, both in terms of evidence required, and in that there are few cases in which land owners have sued due to damage to wetlands, and therefore it is far from certain how the courts would address such a claim. Indeed, I am aware of only one case in which such a claim was pleaded, and while I believe it was successful, it is unreported, I cannot provide a citation (it occurred in the Greater Victoria area in the 1990s) and was a small claims court decision, and is therefore of limited precedent value. However, in bringing such a case one could certainly have regard to case law holding that local governments, as a trustee on behalf of the environment in respect of their lands, may sue for environmental harm (*Scarborough (Borough) v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255 (Ont. C.A.), cited with approval in *Canadian Forest Products v. BC*, [2004] 2 S.C.R. 74 at para. 74), as well as a series of cases holding that property owners affected by flooding may sue for inappropriate development that contributes to the flooding (for example: *Medomist Farms v. Surrey (City)*, 62 B.C.L.R. (2d) 168 (C.A.)).