



**BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS**

***PRESENTATION TO THE ABORIGINAL LAW CONFERENCE – 2010:
Implementing Reconciliation: from law to reality***

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CHECK AGAINST DELIVERY

Gilakas'la, Greetings, Elders, Chiefs, ladies and gentlemen; I would like to thank you for this opportunity to speak to you today at this year's Aboriginal Law Conference: Implementing reconciliation: from law to reality which is convening in the territories of the Squamish, Musqueam and Tsleil Waututh Nations. I appreciate the opportunity to speak at this event. As a lawyer and as the Regional Chief for British Columbia, it is an opportunity to be reflective, an opportunity to connect and share ideas with colleagues.

My traditional name is 'Puglaas' and I come from the Musgamagw-Tsawateineuk/Laich-Kwil-Tach people of Northern Vancouver Island where I live, with my husband Tim Raybould, in my village of Cape Mudge where I also serve as a member of Council.

I was elected Regional Chief of BCAFN last October following the election of the former Regional Chief Shawn (A-in-Chut) Atleo as National Chief. The BCAFN represents the 203 First Nations in BC who provide direction through resolutions passed by Chiefs-in-Assembly. First Nations in British Columbia have entered into an exciting time of Nation building or Nation re-building as we move from a period of pure advocacy to implementing Aboriginal title and rights on the ground. The opportunities we now have are a result of the years of considerable political pressure and advancement made in the courts establishing the legal principles you discuss here and that now guide and shape our relationship with other Canadians. As a result there are now opportunities our people did not have fifty years ago or could only dream of. The corresponding shift in political and legal focus is reflected in your agenda for today's conference. I note with interest

there is no discussion of any significant Aboriginal title and rights cases currently before the courts but rather all the contributions are on aspects of their implementation including reconciliation agreements and their content.

As I reflected recently at another forum, we truly have come a long way in the last fifty years... Fifty years ago in Canada we were a long way from answering the legal question as to whether or not there was still Aboriginal title in British Columbia. Fifty years ago we did not know the scope and extent of the Crown's fiduciary relationship with us as Aboriginal people in the wake of the colonial legacy and the assumption by the Crown of legal responsibility for our affairs. We did not know the full legal extent of our Aboriginal rights. Of course the Canadian Constitution had not been repatriated nor amended to address our Peoples' rights in section 35. There were no First Nations in Canada that were recognized as 'self-governing' in the modern period - there were no settlements of comprehensive land claims and no comprehensive or sectoral self-government initiatives. Fifty years ago our Provincial Territorial Organizations in British Columbia were in their infancy or did not exist at all. And, for the most part there was no economic development on any reserves in BC, save for a handful of mobile home parks in a couple of communities. There was no Assembly of First Nations – no office of the Regional Chief. For the most part our political voice was dispersed throughout our Nations and compared to today we were not so well organized.

Fifty years ago there were no First Nation's lawyers because prior to 1951 the *Indian Act* defined a "person" as "an individual other than an

Indian.” Ten years after and with changes to the *Indian Act*, Hereditary Chief Alfred Scow, became the first Aboriginal person in BC to graduate from law school (UBC) in 1961, then to become a member of the Bar, and to be appointed to the Bench.

Therefore, for the most part, the lawyers in the 1960s and 70s who advocated for our rights were non-Aboriginal. The money was not lucrative compared to other areas of law and many did it out of political and moral conviction. Fifty years ago there were no conferences such as this and, if there had been, the agenda would have certainly been shorter and far less complicated. Fifty years ago advocacy supported the basic recognition of Aboriginal rights and title. *Calder*¹ took just four days at trial. Juxtapose this with the 339 days of trial in *Tsilhqot’in*² or *Delgamuukw*³ which heard 374 days of evidence and legal argument.

The change to the way Aboriginal law is practiced is also reflected in how and where we work. Up until quite recently there were only a handful of people who specialized in Aboriginal law and could be considered ‘experts’ and most worked for small boutique companies or were sole practitioners. Or if they were in the larger law firms it was not considered a lucrative part of the business. Today this has all changed and there are now hundreds of lawyers specializing in Aboriginal law and every big law firm, as far as I know, has an Aboriginal section.

¹ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313

² *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700

³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

So a lot has changed in fifty years – legally and politically. But while progress has been made socially in improving the lives of our people, there still remains significant distance between the quality of life most of our people lead and other Canadians. This despite the advances made in recognition of our rights through the courts... So we must ask “why is this?” ... and ... “what can we do about it?”

Just over a month ago, I was fortunate to have participated on a panel at the ninth United Nations’ Permanent Forum on Indigenous issues in New York. The big news at the session was New Zealand, the US and Canada looking to endorse the United Nations Declaration on Indigenous Rights. The Declaration is, of course, an important landmark in the advancement of Indigenous Peoples’ rights globally. It is particularly important for those countries where Indigenous Peoples remain legally, politically and socially marginalized and where their actual existence is threatened by the state. It becomes very obvious when you participate in these Forums just how far First Nations’ people in Canada have come in terms of addressing our issues compared to other Nations.

While I felt proud of our accomplishments at the same time I could not help but feel somewhat guilty when it came to other Indigenous Peoples and how we represented ourselves as being in their same shoes. What did the Indigenous delegates think about Canada? For example what did they think when they heard that the Government of Canada spends over \$10 Billion on Aboriginal people in addition to the general government expenditure on Canadians, not taking into account

provincial expenditure or the 3 - 4 billion dollars that our Nations generate in our own revenues?

I couldn't help but think that for these people the United Nations' Declaration probably means considerably more for their future where their rights are not recognized in their States' Constitution or where the courts simply ignore them or rule against their arguments and where there is very limited financial support. I can hear some of you thinking "What is she saying?" Is she saying she does not support the UN Declaration or that everything is perfect in Canada, or the courts have given us all that we need? Of course I'm not that naive. I fully support the UN Declaration and everything is far from perfect in Canada. The courts have not given us all that we need. But what I am saying is that we have opportunities and are demonstrating our success. Our situation is certainly a lot better than what some of our political leaders from across Canada would suggest and it is on this note that I want to turn to the issues that confront us today in BC; issues that are as much about getting our people in a position to implement their rights and empowering them, as much as it is about legal concepts of Aboriginal rights and title - - ie., from law to reality.

We all must work to ensure the people who actually live in our First Nations communities can benefit directly from the advancements that we have collectively made and which we can celebrate and be proud of.

On this point as I sat in the General Assembly Hall of the United Nations, I also could not help but wonder what would the average person living in our communities think about the relative merits of the

endorsement of the Declaration? What would it mean to them? For most of our people who live on reserves, I would suggest important legal covenants such as UN Declaration or even section 35 of the Canadian Constitution and the reams of Aboriginal title and rights cases flowing from it, means very little as they personally struggle to make ends meet. As they try to make do in the backward political chaos of *Indian Act* government and the confused and contradictory relationships we still have with Canada as both colonial authority and a partner.

I have been trying, as I am sure many of you have been trying, to figure out what it is we need to do to empower and facilitate social change in our communities so more of our Nations are ready to move beyond the *Indian Act*... Where change is reflective of our Aboriginal title and rights and is also practical... So our people can enjoy their title and their rights.

As lawyers we need to consider this question from the perspective of what are the objectives of our clients?... and interpreting the instructions from them?... and the advice provided. Recognition of rights has never been the end objective in itself. The end objective has always been to improve the lives of our people. Translating rights into actual benefits is equally challenging as getting them recognized in the first place and sometimes harder.

Fifty years ago when there was limited or no recognition of Aboriginal title and rights the advice was simple... Make a claim for land, resources and governance based on the fact that no treaty had been

entered into and the Nations' lands had not been ceded to the Crown. In fact there are still many such claims before the courts, including those filed and put into abeyance after *Delgamuukw* to preserve the right of claim.

Many First Nations have not been involved in full scale litigation and might think they need their day in Court to fight for their claim and are being advised accordingly. Most are limited financially and could never raise the \$15 – 25 million or more needed in today's legal environment to mount a full scale Aboriginal title and rights case. In my mind as the Regional Chief, the real question, though, is "do they need to fight a claim in Court? Or how can we be more strategic with such claims?" I know these questions are debatable, but I ask how strategic would it be given the advancements already made and the opportunities that now exist to create benefits on the ground as a result of the path that has already been laid by those Nations that have litigated in the past or are still in Court? Perhaps we need to increase our focus on supporting the implementation through the negotiation of agreements such as the reconciliation agreements and by supporting First Nations in the immense amount of administrative work required to support the establishment of institutions of government and the exercise of law making authority by First Nations as our Nation's re-establish?

This is not to say we don't need pure advocacy. We still do. We still do not have an actual declaration of title. However, as you know, the legal skills required to provide negotiation support and reaching agreements are quite different than those required to litigate. In fact the

adversarial approach of litigation is not really appropriate to the work that is now required to rebuild our Nations.

Politically we are also in a period where First Nations' leadership is grappling with how best to use our energy and resources to advance Aboriginal rights and the various strategies we can employ given the political reality back home in most of our communities.

In some ways for some of our leaders maintaining a political position of 'all or nothing' in terms of championing rights and title where nothing short of a complete title victory is acceptable, delays the day that ultimately the community has to address, that day where the dismantling of the *Indian Act* begins and ultimately ends; how to actually complete the process of decolonization and negotiate reconciliation with the Crown and, more importantly, re-establish institutions of governance and create a new reality beyond the *Indian Act*.

In some ways it was easier in the past to divorce the actual reality of our *Indian Act* community lives from the fight for legal recognition of rights and title. Our leaders would go to Ottawa, Victoria or Vancouver championing for section 35 and fight vociferously for self-government knowing that the rank and file in our communities if asked to vote in favour of self-determination or self government would probably vote 'No'; afraid of life beyond the *Indian Act* coupled with the insidious dependency on the federal government.

I have great empathy for the leaders that have gone before us that have paved the way for rights and title but who at the same time were really living in two worlds, no better personified than in the UN environment to which I spoke of earlier.

Like many others, I question what would happen if we got everything we are asking for, including the right to self-government? Would we be prepared to govern the day after a declaration was granted? This is the rationale for my words to you today, to collectively help answer these practical questions about the exercise and implementation of rights beyond simply advocating for them. This must also be on the minds of the judges who ask the same question when pondering whether or not to grant a right to self-government or a declaration of title; “If I recognize your right to govern over the land how are you going to govern and what capacity do you have to act on what might be recognized?” This was clearly of interest to the Court of Appeal in Mike Mitchell’s border crossing case in Akwasassne⁴.

In looking forward to what needs to be done to translate Aboriginal title and rights into benefits on the ground we actually have to start in our communities with our people; to address the contradiction of our *Indian Act* reality and the rights and responsibilities we have as Peoples. This means basic community development work and empowerment. This reality is actually not all that complicated or radical a thought. It is just hard to accomplish, and not always politically expedient for government to support although ultimately necessary to formally end the colonial period. It is also not easy for many of our leaders who face

⁴ Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911

challenges back home and the fear of change which at times can be very disheartening and politically crippling. Nevertheless, as we move from pure advocacy to implementation we all, whether government officials, community leaders or professionals, need to think like community development worker's first.

One thing I have come to appreciate in my short time in regional and national politics and working in my own community, is that before there can be any significant social change on the ground in implementing our Aboriginal rights and title our people have to support it, not just verbally and politically through electing leaders that share the same vision, but they actually have to exercise their franchise and vote in favour of change. They have to vote for social change. The twisted reality of our post-colonial transition is that our people have to vote the colonizer out. As you are all aware, this is because the colonizer, in our case Canada, has a fiduciary relationship to our people and cannot simply legislate the *Indian Act* away until our people tell them it is ok to do so. Perverse but true.

No other segment of Canadian society had to decolonize or go through this process to establish basic structures of governance or create the tools for economic and social development. But for our people this process will have to be repeated for each and every one of our nations. While the legal framework and institutional structure for good government and creating the legislative framework to support economic development is in place for the rest of Canada, it is not for us...unless we vote yes to change. While many of our communities have traditional systems still intact, they nevertheless remain

overshadowed – at least on reserve – by the *Indian Act* reality. Our own people, depressingly, often hide behind that reality to their own detriment. This is not their fault.

Many of our people are very unhealthy and still suffer from post-colonial trauma; a result of the residential school experience, the establishment of the reserve system, government defining citizenship, the historical racism and the marginalization of our economies. So how do we develop healthy communities with well-educated and well-rounded citizenry that is sufficiently beyond the colonial experience to be able to participate in referendums and vote out a system that is suffocating? It is a bit of a chicken and egg situation and this is why the work we are all involved in to support social change in our communities is so difficult and at times so unforgiving. But it is this basic community development that we must all embrace and take on the challenge with vigour... With conviction and based on principle.

When I ran for BC AFN Regional Chief I did so with my eyes wide open. I believe I was elected because there are many leaders across BC who are open to the challenge and are fighting to open the 'door' in their own communities to the opportunities we now have. I believe our leaders are concerned that despite the fact the door has now been opened, far too few of our people and our communities are being able to pass through it. To open that door fully and walk through it, we still need Canada and BC to assist us. It is still far too difficult and far too expensive and complicated for communities to navigate their way to the other side of the post-colonial door – all of which is compounded if communities are not healthy or ready to vote 'yes' to change.

While it takes money to mount a movement for social change and effect social change - it is not just about money - there will never be enough money. It will take conviction and it will take dedication; with local champions of change that understand that without such change First Nations will continue to be mired by the challenges of the colonial period. In fact it will take all of us.

In addition to the need to focus on community development and my suggestions that litigation is no longer the only or best option to be promoting I would like to make a couple of observations with regards to the role of the legal profession during this period of transition.

Firstly, I want to address probably the most significant legal and political issues that do need to be resolved amongst First Nations for us to actually truly implement title and rights. That is, what some of us are calling the 'proper title holder' question? When it was pure advocacy, while still a problematic issue, it was relatively straight forward in a statement of claim to set out who the proper Aboriginal title holder was with definitions that often blurred the on-the-ground geo-political reality of our communities; the band vs. the First Nation vs. the Tribal Council vs. the Nation vs. the group that shares the same language, culture and traditions.

In some cases our Peoples are represented using western political terms – the 'nation' or as 'sovereign' – at other times the language reflects our tribal histories and stories – while at other times we are represented reflecting our colonial legacy – as *Indian Act* bands.

This issue is alive politically and goes under a number of different names including ‘overlap’, ‘shared territories’ and so forth... It is an issue the legal community needs to grapple with as well. Quite apart from what the Courts may have said this is an issue that needs to be resolved by First Nations before reconciliation and recognition can be meaningfully accomplished with the Crown.

If we do not resolve these issues then the litigation in the future will be between competing claims to who is the proper title holder. This would be unfortunate. What I am proposing is that the legal community come together, perhaps in a conference, to discuss the approaches so that we all have a better understanding of the complexity so that the best advice can be given to clients and which will ultimately impact our collective ability to move forward.

We are also proposing through the BCAFN as part of the second component of our “*Building on OUR Success*” Action Plan that is, “fair access to lands and resources” – the others being strong and appropriate governance, improved education and individual health – that we, as First Nations, convene a series of tribal, regional and perhaps province-wide sessions to attempt to resolve, politically, the proper title holder question. Whether or not we can accomplish this goal, and in what time frame, is a huge question but now is the time to try and do it. Where competing claims remain after such a process, perhaps Nations can work towards establishing a dispute resolution process that they can agree to and try and resolve it?

The second observation I would like to make with respect to the role of the legal community has to do with the drafting of agreements and laws of our Nations. Ultimately to move beyond the *Indian Act* whether through a treaty, a reconciliation agreement or by some other means our Nations will typically negotiate and conclude an agreement with one or both of the Crowns. In most cases the agreement will be given the force of law through federal or provincial legislation after ratification of the community. In many ways these agreements are more like a statute in terms of their interpretation than a simple contract between two parties. That is the content of the agreements can be relied on by anybody, not just the parties to the contract.

However, when you read them they are often, with all due respect to the negotiators and their legal counsel, written as if they are contracts and because they are negotiated are often less clear than they could be reflecting the various positions of the parties to the negotiations. They are not drafted like legislation where instructions are provided to legislative drafters and the best language or precedence is used to actually write the law.

This problem with First Nations' agreements is compounded by the fact that the Crown, having reached an agreement with one Nation, tends to push language developed in that agreement in a subsequent negotiations they are a party to. While I can understand this approach from the perspective of consistency I am concerned that this incremental and piecemeal approach to agreement making could result in problems moving forward. I am not suggesting that there should be a cookie-cutter approach to agreements. However, what I am

suggesting is that there be a more considered approach to drafting agreements and that we develop mechanisms to share and have continued professional development in this regard. The question of drafting is even more critical when our Nations complete Constitutions and start making written laws moving beyond the *Indian Act*.

This is a practical consideration in implementing Aboriginal rights and title and that will confront every Nation as they move into a post-colonial world. It is certainly the experience of those communities that are self governing whether as part of a modern treaty or sectoral such as developing land, financial or other types of codes.

In moving forward, while some pundits may criticize us whether as politicians, lawyers or consultants that we are now part of an 'Indian industry' enriching ourselves on the backs of the suffering, dysfunction and the uncertainty of the reality of Indian people. I do not subscribe to this condemnation of our collective aspirations to better the lives of our people. Today as we move to implementation we need to overcome this perception. Now is our opportunity to do so as we support our Nations in re-building.

For the First Nations' people in this room I don't need to tell you how we all share a responsibility to give back to our people and we all do so in different ways. For those of you who belong to a community consider what it is that you are doing or could do to assist your own community in walking through the door to a post-colonial world? Perhaps not just in advocating Aboriginal rights and title in court but how you can influence opinion around the kitchen tables of your

reserve? Regardless of local politics and family divisions, in what ways can you safely work with those of like mind to empower your fellow citizens to move beyond the stagnation of *Indian Act* reality? I guess I am asking you to become part of a growing movement for social change that our people are demanding and that is founded on implementing our hard fought struggle for Aboriginal rights and title so new opportunity is not lost or only benefits a few. When citizens of one community begin to ask why another community is doing better than their community our citizens will want answers and will want us to work together. Success begets success.

For those of you that are not First Nations you too continue to have a significant role in supporting our people passing through the post-colonial door. Ask yourself what is it that your company, your business or your legal firm and what you individually are already doing or can do to assist in community development work.

So I ask what can I, as Regional Chief, do politically to help channel your collective compassion and your energy to support our community development work so that our resources and our time is maximized. So that we improve the chances of success for all our efforts and to make a significant difference in more than just a handful of communities as we move forward?

I also challenge our leadership. We have many pulls on our limited financial resources. However, in some of our communities own source revenues are finally being generated so I ask, if we expect the other governments to support our post colonial ambitions...are we dedicating

enough of our own resources to kicking down the post colonial door? I know we have spent considerable amounts on litigation to get to where we are now. Are we prepared to spend similar amounts, or more, on actually implementing our rights?

Our Nations have increasingly been using their own revenues to advocate their title and rights through litigation often costing 10s of millions of dollars. These cases have been important but the real question is... Is it worth spending all this money on repeating a title case in your own Nation when the result will likely be the same and require negotiation and of course the hard work of Nation building. Would it not be a better use of resources to actually re-establish the Nation from the ground up?

I believe there is no better investment a community can make into its future than investing in social change.

What I can say with confidence is that communities that have kicked down the post-colonial door are doing better than those who have not. Sure they have struggles but they are different struggles...struggles that are fought with the confidence of empowerment and the ability to make decisions and take responsibility for one's own actions.

The very fact that all of you are here today and most of you have chosen or may choose a legal career in Indian country to support the advancement of our Peoples' quality of life is honourable. And I include those of you that work for non-Aboriginal governments. It is our job as politicians to ensure the space is available for you to excel, to champion

our interests and to continue to improve the lives of our people. Not just to be equal but to excel.

So in closing let us recognize the significant ground we have made in the last fifty years, let us take the opportunities that lie before us, and seek to empower; individual-by-individual, community-by-community, Nation-by-Nation so that no single person, no single community and no single nation is left out or behind.

As our National Chief has stated, “It is OUR Time!” And I ask you, “If not now, when?”

Gilakas’la.