



**BRITISH COLUMBIA  
ASSEMBLY OF FIRST NATIONS**

***PRESENTATION TO THE INDIGENOUS BAR ASSOCIATION – 22<sup>ND</sup>  
ANNUAL FALL CONFERENCE: INDIGENOUS LAND REFORM IN CANADA***

**PUGLAAS (JODY WILSON-RAYBOULD)  
REGIONAL CHIEF  
KEYNOTE ADDRESS  
October 21, 2010**

*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 Indigenous Bar Association – 22<sup>nd</sup> Annual Fall Conference 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.

The theme of this conference is "Land Reform" – a subject that through world history has meant many different things to different people at different times depending on your political perspective or world view. In the context of First Nations, the question of land reform, not surprisingly raises a number of questions not least of which is "What system of land tenure are we reforming and for what purpose?" Questions every First Nation is asking or will be asking during this exciting time of Nation building or re-building as each of our Nations moves beyond the colonial period and makes policy decisions with respect to their systems of land management.

Jurisdiction and control over land is, of course, one aspect of governance. As such it cannot be isolated from the much broader question of how our governments will ultimately be re-established post

*Indian Act* and the substantial challenges of moving beyond the *Indian Act*. The systems of land tenure our Nations create will be guided by the policy objectives of our governments, reflecting the will of our peoples based on our respective cultures and traditions.

Prior to colonization, historically our Nations were, of course, self-governing operating within our tribal structures. Each of our nations had ways in which access to lands and resources were controlled. In my own tribe we had, and still have, a hereditary governing system where names are transferred from generation to generation through the successions of Chiefs; each with responsibilities for certain geographical areas. This land tenure system is conducted through our 'potlatch'. For many years this traditional system of government was illegal under federal law. As our peoples were moved onto reserves, the *Indian Act* created a different system of land tenure for the reserves that essentially made us tenants on our own lands under the wardship of the Crown with limited or no jurisdiction.

The legacy of this colonial history is the significant challenge we now face in re-establishing appropriate governance including jurisdiction over land management, that respects our cultures and meets today's needs. While most Canadians take for granted that there is a well-established system of government and laws within a legal framework that has been developed over many years, this is not the case for our peoples. Our lands have been governed for us separate and apart from non-aboriginal Canada through the *Indian Act*; neither an appropriate framework for our people - nor for any people for that matter. As government and laws evolved generally in Canada our people were not

allowed to govern ourselves and therefore were not able to adapt. For years with limited political or legal power and as wards of the state we could do little about it.

As a result of this system, the judge in *Musqueam v. Glass* (2000) concluded that the land management provisions of the *Indian Act* had a 'devaluing' effect on Musqueam reserve land by 50% to that of similar adjacent non-reserve lands. We all have stories about how First Nations have lost economic development opportunities because of the government bureaucratic delays under the *Indian Act*. This antiquated federal legislation has created other major issues on our lands, such as incomplete survey boundaries and environmental contamination; or establishing conflicting property interests to local or customary land tenure practices. These issues and others have been left to fester for decades and only serve to impede a community's ability to implement responsive and sustainable land use planning and growth and address community priorities.

In short, there is one matter I think that we can all agree on -- the *Indian Act* is a major contributor to the current quality of life in most First Nation communities and is not an appropriate system for land management. There is a need for land reform where not already achieved.

So why has it been so hard to move beyond the *Indian Act*? And why in some political circles is there a reluctance to move beyond the *Indian Act*? - a reality that we need to understand in order to make progress. Reluctance to move beyond the *Indian Act* can, in some cases, simply

be put down to being a symptom of the *Indian Act* system itself – if only it were that simple.

While aspects of the *Indian Act* are abhorrent to us and have held us back other aspects are actually consistent with current policy objectives of our people and need to be considered in any replacement to the *Indian Act*. On the one hand the *Indian Act* has imposed colonial concepts of government, membership and management of lands which have had negative effects on our people, while on the other hand protections that respect the communal nature and ultimate inalienability of reserve lands are still important to many of us. The complexity of dealing with the impact of the *Indian Act* at the same time as implementing our title and rights has also proved very challenging for both our leaders and for the Crown.

Thankfully, this is changing. As a result of the years of litigation and the political efforts of our past leaders there are, in fact, now many opportunities for our Nations to move beyond the colonial period and walk through what I call the ‘post-colonial door’...To re-establish their governance, including land management in order to create an economy to address social issues and ultimately to improve the lives of our people by increasing their standard of living and having practicing and thriving cultures. Unfortunately sometimes there is a large disconnect between the rights we have won in court or negotiated and our ability on the ground to actually take advantage of our opportunities.

Despite the hurdles many Nations have indeed already moved beyond the *Indian Act* having entered into modern treaties or self-government

arrangements which can either be sectoral or comprehensive. As we look to ensure that all First Nations can take advantage of opportunities that have been hard fought for, we need to look for mechanisms to support community development and the difficult process of decolonization.

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 moving beyond the *Indian Act*, including land reform, 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 social change. The twisted reality of our post-colonial transition is that short of a court saying we have rights over land and the right to govern ourselves, our people have to negotiate with the Crown and then vote the colonizer out. This is because we are wards and 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. Somewhat 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. The legal framework and institutional structure for good government and creating the legal framework to support social and economic development is in place for the rest of Canada, but not for us...unless we vote yes to change. This is a challenge.

So what are we doing at the BCAFN to support Nation building and social change? We have developed a plan entitled *Building on OUR Success* which focuses on four key and interrelated areas. All are based upon the fundamental principle of community empowerment that assumes that at some point every community, every Nation, in our Province will be voting to walk through the door to a post-colonial world. That each will be developing a strategy, an exit strategy if you like, to move beyond the *Indian Act* and this includes land management.

The first pillar of our plan is, not surprisingly, “strong and appropriate governance”. Each community, either individually or in groups depending upon cultural and social ties and issues of proper title holder will need to determine how they will govern themselves and build their contemporary institutions of governance. Strong and appropriate governance is truly necessary to be successful. All the research shows that if our Nations are to reach our full potential and maximize our opportunities we need to govern ourselves appropriately. Without it there is too much political and legal uncertainty, leading to wasted energy and money. Energy and money we can’t afford to waste.

At the BCAFN we are developing what we are calling a “Governance Engagement and Self-assessment Tool” to assist communities in developing appropriate government as part of a social change movement and to stimulate discussion; a discussion that needs to take place around our Council tables, in staff meetings and, most importantly, at band meetings and around the kitchen tables of the citizens in our communities.

Secondly our plan includes working in the area of “fair lands and resource settlements”. Our Nations, our communities, need own source revenue. They cannot rely solely on federal transfers. In BC there are now opportunities for revenue sharing agreements and accommodation agreements with the Crown and benefits agreements with industry. We are working towards all our communities having access to resource revenue sharing. Available to all and not just those that can afford the lawyers or maybe have the political connections to engage with the Crown or are in a hot spot. This is key – fair land and resource settlements that fund the rebuilding of our societies, help pay for our governments and help provide towards the cost of programs and services our people develop and deliver in our own communities.

Finally, we are focussing on the individual because the collective is only as strong as the individuals that make it up. So pillars three and four of our plan are all about “Improved Education” and “Individual Health”. We need healthy individuals; individuals that are free from or can deal with the trauma of the colonial experience. This is still a big challenge as there is a lot of healing required. We need to ensure those that are entrusted to assist our communities in the healing process understand the link between healing and governance reform. It is all linked. Our objective is not just to treat the symptoms of colonialism but to eradicate the disease completely.

We also need individuals that are educated. There is a need to ensure we continue the progress we have made in education. To have an educated population, not just in terms of formal education, but well

rounded in terms of their knowledge of the public policy issues we face and the important decisions our people will be asked to make in the coming years. As I said earlier our people, unlike other Canadians, are being asked to vote on important aspects of social change before their community can pass through the post-colonial door. If they do not understand what is being asked of them, or why, they will inevitably vote 'no' to change.

So returning to the theme of this conference 'land reform' we must understand land reform in terms of the larger process of de-colonisation and as one aspect of governance and the right of our Nations to determine their own future as part of their own Nation building agenda. In fact, over the past twenty years great strides have been made in some communities to move beyond the *Indian Act*.

Communities that have begun the process of de-colonisation with respect to land management have all addressed the question of appropriate governance over lands and types of land tenure on-reserve. They have each considered how land is to be held, how private interests in land are to be created and registered and how local decisions about land use are made and authorized. We can learn a lot from their valuable experiences. Interestingly, all have included some aspect of collective ownership and control while all have also created some form of private interests in land with the registration of those interests, where interests are recorded in priority to one another.

For example, my own community, We Wai Kai, has voted on a Land Code under the Framework Agreement on Land Management, and we

are establishing a system of land tenures and laws relating to land management. Let me give you one example of what this means for our Members. Before our Land Code came into effect, the house where my husband and I now live was owned by Canada, administered by the Chief and Council, and governed under the *Indian Act*. When I purchased that house from the previous occupier, another band member, in reality that person had no legal interest under the *Indian Act* to sell to me and there was no way to register my interest save for the letter we filed in a filing cabinet kept in our band office. Today, after the Land Code my once informal or extra-legal interest in my house is now legally recognized and registerable in the First Nations Land Registry System. If I ever want to sell it I will be able to do so without the approval of Chief and Council or the involvement of Canada. Many of our Nations have informal, customary or extra-legal, however you want to call them, land interests on their reserves. In fact this is the norm. These interests can be legalised through land reform.

Looking at another example I am intimately familiar with, my husband and I also have a condo in North Vancouver which is located on the Tsleil Waututh reserve. Here, we also have a private interest in land. In this case, a 99 year prepaid lease that is also registered in the First Nations' land registry. Tsleil Waututh also has a Land Code in place and has full authority over the management of their lands.

So today there is currently a spectrum of options for First Nations, should they wish to address land reform, management or governance. These range from delegated authority under the *Indian Act* - where the First Nation becomes the agent of the Minister; to sectoral self-

government – including where the First Nation asserts its own decision-making over reserve lands and resources under the Framework Agreement on First Nation Land Management where there are approximately 60 communities who have signed the Framework Agreement on First Nation Land Management to opt-out of the land administration provisions of the *Indian Act* and the *First Nations Commercial and Industrial Development Act* which allows First Nations to establish fee simple on some or all of their reserve lands for economic development purposes and register them provincially (being led by Squamish First Nation); to full self-government like Westbank First Nation or under modern treaties such as with Tsawwassen and Nisga'a. In some of these examples land is held under section 91(24) of the *Constitution Act* and in other cases under section 92 and/or section 35.

At Tsawwassen, they have opted to take their lands in fee simple with full land management authority that is constitutionally protected. They have, interestingly, however put restrictions on how the collective fee simple interests can be alienated so that only Tsawwassen or Tsawwassen members can hold the fee simple. Westbank First Nation under its self-government model also restricts the holding of Certificates of Possession, which are interests in land treated like fee simple under Westbank's Constitution, to members of the Westbank First Nation. In both the Tsawwassen and Westbank cases marketable private interests in land can be created through leaseholds. But this right has been balanced with the policy decision to maintain the collective interests of the community. Both at Westbank and Tsawwassen land prices for all types of interests have been increasing

with growing real estate markets. At Westbank the ability to get 'title' insurance on long term leases has also enhanced land values.

Part of the reason for restricting private interests is because many urban First Nations such as Westbank and Tsawwassen have a land base that is relatively small in terms of area but potentially when the *Indian Act* is removed, relatively high in terms of value. Here the issue is not just about the types of interest in land that are created but about the extent of the underlying jurisdiction of the First Nation and the ability to control the access to assets once the restrictions of the *Indian Act* have been removed.

The fear is economic pressure which could result in a large redistribution of unrestricted fee simple property from the poor to the rich and potentially to non-Aboriginal people which could create a whole host of new social challenges and which could be counter-productive to Nation building. At Tsawwassen and Westbank and in every other community that has gone through a community process to address these issues and move beyond the *Indian Act* this has been a concern – the cultural attachment of the citizens in these communities to their lands precluded any option that put the underlying fee simple ownership at risk or, if it did so, to a limited extent.

The question today, as it has been in the past, is what are the appropriate ways to create private interests in land on our reserves and how best to register those interest while balancing the need for economic development with the policy considerations of preserving community.

In fact any band today under the *Indian Act* could have a vote to ultimately surrender their reserve lands and become incorporated within the provincial governing structures and raise title. What is telling is that no community has ever done this and where they have raised title after treaty and actually done so using provincial institutions they have been very careful to ensure the full jurisdiction required to govern those lands is in place first and that the only party that can benefit to the fullest extent of that title once raised is their members of the community and/or the community as a whole through their government.

The Nisga'a, through the Nisga'a Nation *Land Holding Transitions Act* provides another model of how, under its full jurisdiction over lands, a Nation has been able to make independent decisions with respect to its types of land interests responding to local economic realities. The Nisga'a have provided for the full transferability of fee simple lands on a very limited basis – approximately .05 of their total land base - while limiting the transferability for the vast majority of their land base.

With full jurisdiction over the management of lands, Nisga'a along with the other communities that are already beyond the *Indian Act* have not had to sacrifice the communities' desires for the sake of economic development. Quite the contrary. Full or exclusive jurisdiction is a core component to not only creating a marketable system of land tenure but also ensuring that community concerns regarding the potential loss of ownership are also taken into consideration.

When we consider how the concept of Aboriginal title has evolved through the Courts understanding the importance of the collective interest in land and the need to protect 'community' is also now a legal requirement. The *Delgamuukw* decision in 1997 provided judicial affirmation of Aboriginal title by the country's highest Court: The Court said that Aboriginal title existed before, and exists after, the assertion of sovereignty by colonial authority and, important for this discussion, is a collective right held by all members of a First Nation. It was made clear in *Delgamuukw* that lands held pursuant to Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the group's attachment to those lands. More recently, although only a trial decision, the *Tsilqot'in* decision confirms that Aboriginal title is held collectively by the members of a Nation, that is distinct from what legal entity (political structure) represents them. It goes on to say that Indian Bands, as creatures of a federal statute, are not necessarily the entity holding title.

So if the individual Nation or tribe as the proper title holder consequently has the inherent right of self-government including jurisdiction over land management what implications are there for moving beyond the *Indian Act*?

I raise this point because as more of our Nations go through the process of social change and de-colonization there may be a desire to establish jurisdiction regionally or nationally: e.g., in areas such as health or land management, building on a concept that was raised some years ago about establishing the equivalent of a First Nations' province with

jurisdiction resting in institutions being created beyond the Nation or tribe.

Trying to establish a national system for governance of reserve lands with commonalities between tribes could result in the inability to regularize the informal or extralegal land tenure systems that are currently in existence on reserves and that have not been given legal recognition through the *Indian Act* system - like my home before the Land Code. In order to fit the numerous types of land holdings within our Nations into a single national model would no doubt require some uniformity in types of tenures which, however well intentioned, could prove problematic and unworkable. What was important to the leaders behind the First Nations' Land Management initiative was that each Nation coming under the Framework Agreement has full law making authority over its lands and can create interests in its lands and these interests, however created, are all registerable.

While there is no question that there may be economies of scale in governing regionally or nationally there is still a serious political and legal question regarding the extent to which they can or should exercise jurisdiction in areas where authority rests with the Tribe or Nation or, where if it is not being exercised by the tribe or Nation, is being exercised by Canada on behalf of our Nations.

These legal issues of whom has jurisdiction become even more complicated when questions of concurrent federal, provincial and First Nation jurisdiction are considered. But the point I want to leave you with to think about is that when re-building First Nation government

what is the role of regional and national bodies and how would this square with questions of proper title holder and Nation building? Questions again that every Nation will need to consider as they move towards and through the post-colonial door whether as a band or as a tribe or perhaps in some other aggregation? Questions also Canada, and to a lesser degree the provinces, must consider as we collectively move beyond the *Indian Act* and reform land systems on-reserve.

What I can say with confidence is that we can learn from our experiences, and that we should not understate the importance of a community going through a process to determine its own land tenure system considering a range of issues that include its historical systems of tenure and those tenures that may have existed extra-legally to the *Indian Act* and others. Regardless of the legal debate of who has the right to govern, politically if systems are to be supported and endorsed locally, the community development work I spoke of earlier is critical.

So First Nations need to know the options and the implications of their choices with regards to re-establishing governance including land management particularly at this time when there are so many options out there and perhaps new options being considered. As you are all aware, the BC Assembly of First Nations supports unequivocally the right of our Nations to determine their own future and choose their own options for land reform.

So coming back to where I started my presentation, the question of land reform is one aspect of appropriate governance and the BC Assembly of First Nations' Governance Tool will hopefully assist

communities in considering the policy considerations involved, the current legal landscape and the various opportunities that are available to them.

While communities start to consider their post-*Indian Act* future, Canada will, to be sure, continue to enact or seek to enact legislation that addresses aspects of our governance. In some cases this legislation may be led by our peoples. In other cases it could be the result of court cases. In others it may be led by policy direction from INAC or Cabinet. Examples of federally led legislation currently making its way through Parliament include Bill S.11 and Bill S.4 which deal with some of the most pressing deficiencies in governance as a result of the *Indian Act*: namely drinking water on reserve and matrimonial real property on reserve, respectfully.

As the Regional Chief and as the holder of the national AFN portfolio for Nation Building and First Nation Governance, we will continue to remind Canada that these federally legislative initiatives must, if they do go ahead, only be seen as interim until communities rebuild and must be consistent with our broader Nation building agenda. They are not a substitute for the end goal which is re-establishing our Nations with appropriate governance and strong polities. It is important that our energies and our resources, limited as they are, are focussed on de-colonization in our communities and Nation building. The fact that many of our communities are not even having this conversation or even ready to move towards self-government should not be used as an excuse for avoiding the complex issues of de-colonization in favour of further imposition of federal laws.

So before I close I do wish to leave you with an idea; for some time now the Aboriginal Senators have been advocating a Self-Government Recognition Act which would facilitate communities moving beyond the *Indian Act* without the interminable negotiations with Canada and where, I would argue, the energies could be expended on community development work. There are a number of problems with the Act as it has been proposed in the past and we have learned a lot from our experiences from implementing self-government, but the concept is, I believe, still worth re-visiting. While it is may not be realistic that First Nations can be out of the *Indian Act* in five years as suggested what is realistic is that an appropriate framework respecting the concept of nationhood and consistent with the state of the common law can be put in place so that all communities or Nations when they are ready can move through the post-colonial door and get out from under the *Indian Act*. Here in British Columbia this is perhaps less of a challenge than in other parts of the country where the relationship with the crown is more complicated as a result of the historical treaties.

In closing, First Nations people have been consistent in the portrayal of our sacred relationship with our lands; our elders have taught us that our land, our culture, our languages and our identity are all intertwined. We are the stewards of these lands and resources for our future generations. This is our responsibility to our children, grandchildren and their children. Our lands and resources are entrusted to us by the Creator. They are not just a “commodity” to be bought and sold.

It is not just the Indigenous Peoples' place in law that makes us unique. Life in our communities --- on our lands and territories, among our families, our cultures, our languages and our traditions --- is a unique and precious gift, a respite from all that is everywhere else. While we want economic development it is not at the expense of our cultures and our peoples and our values. The benefits of land reform and creating private interests in our lands and developing markets must be balanced with our collective interests.

The preservation of our lands for future generations is a sacred, inalienable trust, carried forward by each generation. This has been our way, our tradition, since time immemorial. It is on these principles, that leading court cases have been argued and won.

The issue of any Indigenous land reform is of critical importance not only to the future prosperity of our People, but also to the future prosperity of Canada as a whole. All of us in this room, including legal advisors to First Nation governments, federal and provincial governments, and to businesses, must acknowledge the significant contributions we can make towards ensuring that our Indigenous interests continue to be protected for future generations. This is our collective responsibility.

It has been said and I know it remains true today, "the land belongs not only to people presently living, but also to past and future generations, who are considered to be as much a part of the tribal entity as the present generation." At the end of the day any land reform initiative that we advocate or support as First Nations' leaders should have as its

ultimate objective the improvement of the quality of life of our people by improving our standard of living through practicing and thriving cultures. Anything less our people will no doubt reject.