



**BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS**

***PRESENTATION TO THE
CANADIAN ABORIGINAL MINERALS ASSOCIATION'S – 19TH ANNUAL
CONFERENCE: MEETING MINDS, MAKING MINES – Aboriginal
Community Development Through the Mining Sector***

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CHECK AGAINST DELIVERY

Gilakas'la. Greetings Elders, Chiefs and to all the delegates. My name is Jody Wilson-Raybould. My traditional name is Puglaas and I come from the Musgamagw-Tsawateneuk/Laich Kwil Tach people, part of the Kwakwaka'wakw, the Kwakwala speaking people of northern Vancouver Island where I live, with my husband, in my village of Cape Mudge where I also serve as a member of Council.

I would like to acknowledge the territory of the Coast Salish Nations – Squamish, Musqueam and Tsleil Waututh Nations, and thank them for allowing us to be on their lands.

I am pleased to be participating in this the Canadian Aboriginal Minerals Association's – 19th Annual Conference: Meeting Minds, Making Mines – Aboriginal Community Development Through the Mining Sector.

Thank you for the invitation to this conference and the opportunity to share with you some of my views on the theme and with respect to the exciting but challenging period we find ourselves. A lot has changed in the world since your organization was first established some 20 years ago.

First Nations in BC, and indeed across Canada, are in period of profound transition. After years of denial of Aboriginal title and rights by the Crown and after years of litigation and conflict, our peoples are finally re-emerging and entering what can best be described as a post-colonial world. We are once again finding our voice. We are re-building our lives. We are rebuilding our communities. We are re-building our

Nations within confederation based on our unique cultures and traditions and based on our rights to lands and resources. Today, there are new opportunities; opportunities that the generation before us did not have. But so too are there new challenges. Challenges we need to overcome if true and enduring partnerships are to be developed and maintained. Decolonization is not easy; neither for us nor for the colonizer.

In my comments today I want to explore these challenges and what action can be taken by leaders of industry, as well as federal, provincial and First Nation leaders. So there can be a meeting of the minds.

Today as our rights and title continue to be recognized on the ground it is fair to say that there cannot be any major mining or development activity within our territories without First Nation involvement. There is the need for the free, prior and informed consent of the Aboriginal title holder before Indigenous property rights are impacted. This is required under international law and has been advanced in our domestic courts. How free, prior and informed consent is sought and given, is at the core, the central challenge operating at many levels for government, industry and our Nations.

To put this evolving reality into perspective we have never had a period in this province's and Canada's history where there has been so much planned mining development and other major capital investment since Aboriginal rights have been established and the duties on the Crown confirmed. When all of the major mining and development projects in BC were undertaken primarily in the 1950s, 60s and 70s, there was no

section 35 in the *Constitution Act* recognizing Aboriginal and treaty rights, there were limited court decisions respecting what Aboriginal title and rights meant, concepts such as consultation and accommodation were not in the lexicon and for the most part major development projects proceeded without our involvement and certainly not with our free, prior and informed consent. Our peoples were essentially the forgotten people at the end of gravel roads. This is no longer the case.

Today there is a resurgence of planned mining and resource extraction and billions of dollars of planned investment. BC Premier Christy Clark announced only a few weeks ago that eight new mines are planned in the coming years, not to mention huge and for the most part controversial resource projects such as the Site C Dam on the Peace River, the Enbridge Northern Gateway project, significant transmission line expansion, Prosperity Mine, the Kinder Morgan expansion, two liquid natural gas depots that are all front and centre in the news. Despite the current blip in the world economy, the global appetite for natural resources is increasing as foreign investors look to our soils to either purchase our resource companies, partner or sign long-term contracts for delivery of product. We simply have not had this level and kind of proposed activity in a post legal world of *Delgamuukw*, *Haida* and *Taku*. I know this is probably not news to anybody in this room and of course your companies and our Nations are trying to work through what this means practically on the ground to support sustainable mining exploration and development moving forward. First Nations are not on principle opposed to mining or development but not at any cost.

While in the past denial and delay may have been the preferred political strategy of government as opposed to having to make publically unpopular choices to support resolution of land claims, today there is really no choice. While facetiously one could say “the chickens have now come home to roost,” in truth reconciliation will be good for all British Columbians as will the sustainable economic development that follows.

As Aboriginal title and rights crystallize on the ground, with new court decisions and demands for justice, at the regional, national and international levels, it is also not surprising that Premier Clark is rightfully worried that the BC treaty-making process is taking too long and that her government is focusing instead on “striking economic development deals with Native leaders who are willing to do business” as reported in the *Globe* last week.

It is no secret that the BC government is politically banking on the ambitious and unprecedented level of investment in major development projects over the coming years and the new jobs hopefully created. It is not surprising for anyone intimately involved in treaty negotiations that deals have had to be made outside of the treaty process. BC officials must now act where there is a reasonable presumption of Aboriginal title and thus agreements need to be reached. There is incentive and motivation. For legal reasons BC cannot wait for a treaty. In fact, economically, neither can First Nations nor do most want to.

Also, in truth, unless there are significant changes to the BC treaty making process and in particular the approaches taken by Canada and BC to substantive issues at the table – their mandates – it is unlikely, in my opinion, that there will be many more treaties, if any, other than those that are very close to completion. This is unfortunate but true.

But be under no illusion, notwithstanding the present issues with the BC treaty-making process and the new focus of the Premier, settlement of the land question remains fundamental for all our Nations in BC and all citizens. While it is certainly positive that Premier Clark wants to deal and is prepared to deal and is dealing outside of treaty-making, a word of caution.

Simply doing business with the willing cannot be a substitute for resolution of the land question with the many.

The current inability to reach fair and meaningful settlements with the majority of our Nations through treaties or otherwise cannot be held out as a reason to step back from the broader objectives of reconciliation and the need to find ways to settle the “land question” once and for all. We cannot give up because it is too hard.

We need to understand the impediments to settlement. This requires a high level commitment not only from Premier Clark but also from Canada as well as a significant amount of fundamental community development work on the ground in our villages to complete the slow and often painful process of decolonization.

From my perspective we need to refocus our efforts on community led governance reform.

In the absence of appropriate governance at the First Nations or tribal level it is not only difficult to know who may give free, prior and informed consent, but also whether the political and legal structure of the group you are dealing with has the authority and political legitimacy to engage with you. And are they the proper Aboriginal title holder? A serious problem for First Nations if we are to take advantage of opportunities and develop our economies, but also now, a serious problem for the Crown and industry.

Let me explain what I mean and what we intend to do about it.

Prior to the declaration of Crown sovereignty, our Nations were, of course, self-governing based on our respective cultures and traditions which varied across Canada. After colonization our peoples were subjected to federal wardship and control under the *Indian Act*. Our colonial reality is that for over 125 years our Nations have been governed by Canada under the *Indian Act* and then only with respect, for the most part, to the small reserves that were set apart for us in denial of our broader property rights to our traditional territories. For most of our Nations the *Indian Act* and the federal bureaucracy that administers it still governs our lands. This is a wholly unacceptable system of government for any peoples let alone Indigenous peoples and is no framework through which to implement Aboriginal title or rights and to address questions of major development within our territories.

The impoverished system of governance under the *Indian Act* is not only weak and inappropriate but simply not capable of supporting the types of decision-making and responsibility that recognition of Aboriginal title demands. It has to be replaced. We have to fix our system of government. It is only with strong and appropriate government that our Nations can truly engage with the Crown and third parties in a post-colonial world and legitimately represent the views of the Nation in making difficult and potentially controversial decisions respecting our position or involvement in major economic development projects, including mining projects.

To put it another way, the very limitations of *Indian Act* reserve based government that hindered the ability of our Nations to develop the economies on our reserve lands are now the same impediments to engaging as effectively as we could with industry and businesses off-reserve within our broader traditional territories and therefore impacting the broader economy. Modern treaty-making was supposed to resolve this problem but it has not.

So it behoves us all to accelerate our efforts to create a process that can truly address the fundamental questions that need to be resolved before there can be true reconciliation between our Nations and the Crown and the implementation of hard fought for title and rights.

As Indigenous peoples we have great admiration and are truly indebted to the determination and foresight of our leaders, many now passed on, that through their advocacy and sense of purpose have ensured we

are where we are today. Today, however, the challenges we face are somewhat different than they faced because of their success. Consequently our focus is changing. It is no longer just about the protests and the advocacy for change but rather ensuring that the hard fought for rights are actually translated into practical benefits on the ground, in our communities. While we are not naïve that there are still many issues that need to be resolved either in the courts or elsewhere and still a need for advocacy, we also have a lot important work to do back home. One of the biggest of these challenges is governance.

While politically it is easy to stand up and say that the governing structures under the *Indian Act* are not appropriate, as I have just done, what is not so easy is figuring out what replaces it for each of our Nations and how we do so in a reasonable timeframe.

For its part Canada must revisit its policy with respect to self-government and land claims so that it is consistent with domestic and international law and Canada must support our Nations' re-building our governing institutions post-*Indian Act* forthwith and not wait, and certainly not wait for and make governance reform conditional on signing a treaty. Did you know that if a community is ready to move beyond *Indian Act* governance it may actually be held hostage under the *Indian Act* until a treaty is reached? Did you also know that Canada unilaterally assesses the readiness of our communities to move beyond the *Indian Act* and consequently has become a bureaucratic gatekeeper to social and political reform and justice being served?

The BC government, for its part has to continue and increase revenue sharing with all our Nations and to ensure fair access to lands and resources that supports Nation building and good governance. The Province needs to ensure during this period of transition that it does not discriminate and deals with all Nations and, to the extent possible, work within the existing, if imperfect, institutions and structures. In fact there is a moral, if not legal imperative, to go above and beyond with our Nations in transition, to ensure that the province's obligations with respect to consultation and accommodation are met. BC must also pressure Canada to stop dragging its feet on land claims settlement and ensure Canada supports governance reform. It is the people of this province that suffer the most when Canada's policies do not allow it to act quickly or respond to our issues and the opportunities. The BC government has more at stake than Canada so should really be pressuring Canada politically to step up to the plate and do the right thing.

For our part, our Nations need to continue our governance reform as well as resolve issues of shared territory and overlap that have always historically existed but during the colonial period have been complicated by the creation of reserves and *Indian Act* governance. Without knowing who speaks with authority for the Aboriginal title holder there can be no certainty. Most importantly we need to ensure our people are behind the change and supporting our legitimate and recognized governments. There is, as all of us who live and work back home know, a great fear of change despite the terrible impacts of the *Indian Act* system; "the devil you know rather than the one you do not". A sentiment reflective of the fact that many of our people fear

we will make the same mistakes as the colonizer did and establish systems of governance that are not fair or accountable and without proper controls. However, we also do not want anarchy. Without the support of our citizens, there can be no true progress – as ultimately it is our people in each of our villages, that have to vote the colonial system of government out and say what replaces it.

So we all need to work together; the federal government, the province and First Nations, with common purpose, to reinvent the land claims process.

While the task of reconciliation is complicated, now is the time to act and all parties must be up to the task. The seriousness of what is at stake for all British Columbians is no longer in question. It is not without significance that BC has been declared one of the worst jurisdictions to undertake mining exploration and development because of the failure to adequately address Aboriginal rights in a country that legally protects them. So commensurate with the seriousness of the problem, appropriate resources in terms of people and time based on true commitment and priority is needed. We need the best this country and province have to offer in terms of problem solvers and negotiators to work to find the solutions and to take charge. We need adequate resources – not simply money to support an industry of low level negotiation with little chance of results that go on and on and on and ironically delay resolution.

Moving forward it is also important that no community or Nation is left out or behind because the social and political consequences of doing so

would be intolerable. If conditions in some Nations improve while in others they do not this will lead to a new level of social unrest. We have a responsibility to all our Nations and not just those where the government of BC or industry might want to build a mine, establish a port or construct a pipeline. De-colonization cannot just be a factor of “location, location, location.”

From the perspective of wanting to translate legal rights into practical benefits on the ground, when I ran for and was elected Regional Chief it was on a platform that focused on Nation building with four pillars: 1) strong and appropriate governance, 2) fair access to lands and resources, 3) improved education, and 4) individual health. The first pillar, not surprisingly, is governance and I have undertaken, with the support of many people who have practical expertise in re-establishing post-*Indian Act* government developed a comprehensive *Governance Toolkit: A Guide to Nation Building* (see our website www.bcafn.ca for PDF version of Toolkit) which looks at what our peoples are actually doing to establish strong and appropriate governance beyond the *Indian Act*. It looks at establishing the core institutions of governance and considers the jurisdiction these governments may exercise or are exercising. It looks to our successes and where we can build on that success. It looks to where work is needed.

In putting the Toolkit together it became very evident that, despite efforts in the past, there is no simple or effective process whereby our Nations can rebuild their core institutions of governance when they are ready, willing and able to do so, and move beyond the *Indian Act*. In BC a First Nation is generally “encouraged” by Canada or the Province to

look to the BC treaty-making process in order to reform governance as the Crown looks to achieve broader certainty and sign off on the Aboriginal title question. While there are sectoral governance initiatives dealing with particular jurisdictions like lands or education, there is no simple mechanism to move beyond the *Indian Act*. So despite the need for strong and appropriate governance there are no appropriate mechanisms to develop or reform governance at this point in time either in BC or across Canada.

While attempts have been made to reform governance, to date other than the few agreements reached, progress has been woefully slow and painfully controversial. At least as a country we have moved beyond the debate as to whether or not Aboriginal groups actually have a right to govern themselves, to rather what is the appropriate form of government needed.

But what do we need to do to speed up the process of de-colonization and re-establish strong and appropriate governance? I submit the federal government needs to enact governance recognition legislation premised on the United Declaration on the Rights of Indigenous Peoples and consistent with section 35 of the *Constitution Act*. Legislation that is enabling so that when a Nation is ready to re-establish post-colonial institutions of governance post *Indian Act* it can do so on a principled basis and without a federal gatekeeper, outside of the treaty process, and where the focus is on practical local rebuilding and not interminable and overly legalistic negotiations with the Crown.

Because there is no bigger investment in our future, save perhaps education, than investing in rebuilding our governments from the ground up, as Regional Chief, I spend as much time as I can in communities working with our leaders to support their governance initiatives and to share with our leadership what other Nations are doing and what is possible and where the political and legal challenges to our efforts lie. What I have found quite compelling is just how many of our Nations have or are trying to sort out their core institutions of government by developing a community constitution in which they seek to set out the structure of their government *post-Indian Act*. What is also telling is how many false starts there have been.

To me this is the evidence that we need recognition legislation, a simple mechanism by which a First Nation that chooses to govern outside of the *Indian Act* and develop a constitution can do so.

While our Nations may develop a constitution and can legally argue a section 35 right to make it, the reality is the *Indian Act* is still there lurking in the legal background unless a court rules otherwise. So we need legislation. This is not a new idea.

Over the years numerous commissions, parliamentary committees and other bodies have argued the need for federal recognition legislation. In fact, Bills have been proposed in the past. Once in the early 1980s as a government Bill after the failed constitutional talks and then again through various iterations of a senate sponsored Bill proposed by Aboriginal senators. But passage of such legislation at the time was not politically possible; either because of the unwillingness of the

government of the day to support it or the unwillingness of First Nations or both.

Recognition legislation would confirm that once a First Nation has passed a constitution as legitimized by their people, it becomes recognized law, is enforceable and replaces the *Indian Act*. In fact, this is what the tribes in the US have done. Pretty much all of the recognized tribes in the States have now passed constitutions that govern their affairs.

Today, politically and legally, I would suggest it is now possible that appropriate federal recognition legislation could be developed and actually pass. This would require a considerable amount of commitment and work and, of course, would need to be led by our Nations.

At the BCAFN, as mandated by our Chiefs, we have begun this developmental work on an optional governance initiative for BC. This is exciting work that I know will not be without controversy but is overdue.

Governance recognition legislation, while not a new idea, is an idea whose time has come.

For those First Nation leaders here today, you all know that taking on the challenge and the work of governance reform at the band level is no easy task and can be politically risky. What is so encouraging though, is that despite the challenges, over 70% of our Nations here in

BC are involved in some form of governance reform activity. We know where reforms have been instituted they are working.

I would respectfully suggest that as we go down this route in BC it is in the interests of industry to strongly lobby and petition the government of Canada and where necessary the province of BC, to support this work. It is in your interest as well as ours that our Nations have strong and appropriate governance.

Your economic fate is our economic fate and our collective fate will be determined by whether or not our First Nation governance is effective. We need your help because there is no guarantee that Parliament will do the right thing *vis-a-vis* the *Indian Act* and our proposals for change without yours and other Canadian's encouragement and political pressure.

And as with the caution to Premier Clark not to use the slow process of treaty negotiations as an excuse not to look for improved ways to comprehensively address the land question, so too we caution industry; just because our Nations are in a period of transition in terms of our governance do not use this as a convenient excuse not to deal with our Nations or work with our communities in the present. In fact, it makes the activity and how you interact with our Nations even more significant given that it will not be until the larger challenges of rebuilding governance and settling claims are resolved that truly a new and enduring relationship will be established.

Simply just doing what the provincial and federal governments might tell you to do is not enough. The corporate choices you make today will determine your own fate. Something that Taseko Mines is learning very clearly.

In concluding my remarks, therefore, I would like to leave the industry reps in this room with some parting thoughts with regards to dealing with our Nations. There are a number of things companies can do now and certainly moving forward to build relationships/partnerships with our Nations that many of you are already doing or that are being talked about at this conference.

Firstly, while the crystallization of our title and rights now requires consultation with us and in many cases accommodation for our interests, please do not simply look at existing First Nations' governments as an obstacle to resource extraction or a 'box' to tick off on a checklist for what needs to be accomplished in order to get access to natural resources. I guarantee you that if you approach our issues in this way it is far less likely your project will ever succeed.

Second – assuming a First Nation government accepts a proposed project in principle, it is likely you will be asked to enter into a partnership of some sort and that this partnership can bring value to the overall project and therefore investors. This might be an equity stake.

Third – deal with First Nations early or first before any other body or group.

Fourth – be prepared to scale back your expectations and timelines if there are concerns by our people as represented by their governments about the size and scope of the development activity. Our Nations, again as I have said, will not accept development at any cost even if they are going to benefit from revenue sharing or will be involved in some capacity with the actual business.

Fifth – please do not consider only the provincial or federal government as the authorizing body for resource development. As First Nations' governance re-emerges and as we establish land use plans and development guidelines within our traditional territories our Nations' governments will increasingly become involved in the approval processes for natural resource extraction in our respective territories. There will be, and already is in some cases true shared-decision making examples in BC. This is a good thing. It provides certainty for all.

Sixth – please do not confuse the role of our leaders in their capacity as representatives of our governments and stewards of the lands, and the role of our leaders -sometimes the same people and sometimes not - that are involved in the business arms of our Nations - the development companies run by our First Nations or indeed run by our citizens as private enterprises. This is important as these confusions can be easily made where our governments are seen as both the approving body for resource development activities - the body with whom consultation is addressed- but also may be seen as the directors of the business arm of the First Nation leading to potential conflicts of interest.

Seventh – notwithstanding issues you might have with a First Nation or group at any point in time, please support our ongoing efforts for governance reform and Nation building. Stronger Nations properly constituted with clear powers and authority and the capacity to govern will help ensure more meaningful engagement, leading to increased potential for lasting partnerships as well as meeting the evolving legal requirements for free, prior and informed consent.

And finally the last piece of advice is that these considerations apply equally to First Nation run businesses as they do to non-First Nation run companies– whether the business activity takes place through community owned enterprises or privately owned enterprises.

In conclusion, each of us in this room have a role to play and an interest in supporting First Nations during this transition period of Nation building or rebuilding.

Yes, the colonial period has left scars. Yes there is pain and anger. Yes, it can be politically unpopular to champion Indigenous rights. This is no excuse, however, for inaction. Indigenous rights are human rights and while those of us here today did not create the problems we have it within our grasp to help solve them. To inherent a problem and then work around them, we risk becoming a part of the problem if we simply pass them on to someone else to solve. We have to be bigger than the problems.

In Canada, there really can be no excuse for not resolving issues of appropriate and strong First Nations' governance. We know what

needs to be done so let's do it. If not, as it has been in the past there will be in the future questions about the legitimacy of decisions made today and continued uncertainty on the land.

In the BC Region, as we continue to support our Nations' governance reform work and pressure for recognition legislation to open the door for the many and not just the few to move beyond the *Indian Act*, we will be looking for your support and your help.

And finally, as I think about the days ahead and the difficult decisions that are going to have to be made by all of us with respect to major development projects, I sincerely hope we will be able to resolve our differences, find solutions and truly have a meeting of the minds.

For our peoples this will not happen though, if we ever lose sight of our underlying objective...

Governance reform, participating in resource development and economic development (whether in mining or some other sector), and achieving business success is not the end in itself but is rather a means to an end.

For our peoples the end objective is to have healthier and more prosperous First Nations' communities with our peoples enjoying a higher standard of living with practicing and thriving cultures.

Our efforts and our work will be judged accordingly. *Gilakas'la*.