BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

PRESENTATION TO INSIGHT – ABORIGINAL LAND RESOURCE MANAGEMENT FORUM

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January 31, 2012

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 *Aboriginal Land Resource Management Forum* which is convening in the territories of the Squamish, Musqueam and Tsleil Waututh Nations. My traditional name is 'Puglaas' and I come from the Musgamagw-Tsawateineuk/Laich-Kwil-Tach people of Northern Vancouver Island where I live in my village of Cape Mudge where I also serve as a member of Council. In my community I also sit on our Lands Committee which is responsible for advising council on implementing our Nation's Land Code and the development of laws under that Code.

As a member of my community and having worked on our Land Code this forum is a good opportunity for me to be reflective on what is a most timely and important subject matter – First Nation's land management and systems of land tenure on First Nation lands. A subject that has been talked about in the press with calls for more private property rights on-reserve as the solution to our social and economic woes… If only it was so simple.

First Nations are in a period of transition. We are building, rebuilding our Nations. We are seeking fair access to land and resources beyond our small reserves. We are looking to share in both the decision-making with respect to our traditional lands and to benefit from those lands where we agree with the proposed land use, as well as to govern our existing reserve lands or settlement lands. While much I am sure will be said at this forum about land and resource management within our broader traditional territories, today I would like to focus on the

management of our existing reserves or settlement lands and our success at moving away from governance under the *Indian Act*.

Maybe not as fast as some of us think is necessary or believe is possible with political will, but nevertheless forward movement along a continuum of governance options shedding the *Indian Act* yoke. One of the most important areas we are doing this in is with respect to lands and land management; and particularly here in BC.

In looking to establish our own systems of land tenure and to move away from the governance of our lands under the *Indian Act* we are asking ourselves some very fundamental questions; these include, "How is our land to be held?", "How are interests in land created?" and "Who can hold interests in Land?" and "How are we going to govern and administer our lands?".

Questions every First Nation is asking or will be asking during this 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. In fact it is not just our Nations that are looking at this subject – the Aboriginal Affairs House of Commons Committee is also proposing to study what it calls "Land Use Modernization".

However, let us not forget that jurisdiction and control over land is only one aspect of governance. 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

systems of land tenure and governance structures 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 ward ship 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. As I indicated in my remarks at the Crown First Nation Gathering in Ottawa last week, 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. Despite our rich traditions prior to contact, our lands have been governed for us separate and apart from non-Aboriginal Canada through the *Indian Act*, an inappropriate framework for our people – an inappropriate framework for any people. 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.

Anyone who has worked under the *Indian Act* system of land management is aware of how First Nations or their citizens cannot operate at the speed of business and lose economic development opportunities or not maximize their return because of the way that *Act* operates. Where decision-making is in the hands of risk adverse bureaucrats or Department of Justice lawyers or how there are inevitable hurdles to overcome in trying to use land as security --- although it can be said some have become quite good at making "a round peg fit into a square hole," getting around the *Indian Act* in the absence of there being a viable mechanism to a First Nation for getting out from under it.

In addition to the obvious issues of taking security and registering interests in lands, the antiquated *Indian Act* system has created a legacy of 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 not an appropriate system of government including land management. There is a need for reform where not already achieved.

So why has it been so hard to move beyond the *Indian Act*? Why in some political circles is there a reluctance to move beyond the *Indian Act?* – And why have people been forced to fit that round peg into a square hole? ...A reality that we need to understand in order to make progress.

While aspects of the *Indian Act* with respect to the management of lands are abhorrent to us and have held us back, ironically, other aspects are actually consistent with current policy objectives of many of our people. This needs 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.

Over the past twenty years great strides have been made in many communities to move beyond the *Indian Act.*

Every community that has begun the process of de-colonization with respect to land management has 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, voted in favour of our own Land Code under the Framework Agreement on Land Management (2009), 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 Citizens including myself.

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 the house 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 legalized through a First Nation taking control over land management.

Looking at another example I am personally familiar with, my family has property in North Vancouver 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.

Today, in fact there is a continuum of options for First Nations, should they wish to take on the challenge of land management or governance. These include 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 and opts out of the land administration provisions of the *Indian Act* (approximately 25%) 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 comprehensive self-government like Westbank First Nation or under modern treaties such as with Tsawwassen, MaaNulth, 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.

Looking at some of these options I will focus on the Framework Agreement on First Nation Land Management as it is the one I know the best given my own communities experience and also as now being an elected director on the Land Advisory Board. Also if the *Globe and Mail* is to believed it is an initiative that at will be opened up to many more First Nations that wish to sign onto the Framework Agreement in the near future.

The Framework Agreement was the first time in Canadian history that First Nations from across the country came together as a group to develop, negotiate and sign a government-to-government arrangement with Canada with respect to land management. In 1992 there were 14 Chiefs from across Canada searching for a way to take back control of their reserve lands and resources. In 1996, they negotiated and signed the Framework Agreement with Canada. In 1999 Parliament passed the *First Nations Land Management Act* ratifying Canada's commitment to the Framework Agreement.

On January 1, 2000 – day one of the new millennium – 3 First Nations began operating under their own land codes and resumed jurisdiction over their reserve lands and resources, no longer held back by the paternalistic *Indian Act*. Today 58 First Nations are signatories to the Framework Agreement and 37 First Nations now have ratified their land codes. A few days ago in Ottawa Minister Duncan announced a further 18 additional signatories, beginning in April 2012. Together the 76

signatory First Nations represent 12% of all First Nations in Canada. 65 other First Nations are currently on a "waiting list" to be added as signatories. Hopefully the wait will not be too long.

The Framework Agreement First Nations are responding to economic development opportunities at the speech of business, as the following statistics indicate:

- $53 million investment from member-owned businesses
- $100 million investment from third parties businesses
- More than 2,000 employment opportunities for band members
- More than 10,000 employment opportunities for non-members pumping hundreds of millions of dollars into local economies
- Administration costs per land transaction reduced to an average of $500 by First Nations compared to Canada's cost of more than $2500

In my opinion the Framework Agreement has been a success because it was developed and led by First Nations, not Canada, and continues to be led by First Nations. For First Nation's government to succeed, whether sectoral or comprehensive, the work must be developed by our people. It must be legitimate. Developing your own Land Code is empowering.

Further, many First Nations have opted into the Framework Agreement because it maintains reserve lands and in particular the collective

ownership of the reserves for the use and benefit of Indians. This is important for many First Nations; the lands cannot be ultimately surrendered and sold because they must be protected for future generations; fee simple title is not allowed. This does not mean that there are no private interests in land permitted – Quite the contrary. What it does mean though is that fee simple interests cannot be created which can be alienated or sold to non-citizens are not permitted.

Finally, I believe the main reason why First Nations have opted into the Framework is because it provides comprehensive land management jurisdiction where full decision-making and control is the responsibility of the community, not Canada.

Moving along the continuum of governance options some Nations have addressed lands and land management as part of comprehensive governance arrangements.

At Tsawwassen, for example has negotiated their land management arrangements in the context of a modern treaty. Through the Treaty arrangements Tsawwassen opted to take their lands in fee simple with full land management authority that is, unlike the Framework Agreement, 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. Tsawwassen has a number of Land related laws and planning processes that I am sure Chief Baird will discuss today.

Westbank First Nation under its self-government model, which was negotiated outside of the BC treaty-making process bilaterally with Canada, also restricts the holding of Certificates of Possession, which are interests in land treated like fee simple under Westbank's Constitution, to members of Westbank First Nation.

In both the Tsawwassen and Westbank examples of land management under self-government marketable private interests in land can be created through leaseholds to any person. Interestingly, and not without significance, 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 --- in fact they have sky-rocketed. 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 at both Westbank and Tsawwassen, as I understand it, was that economic pressures 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. That is what is the point of trying to build a Nation and a community if everybody has left – whether because they wanted to or had to for market reasons? 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. Here a lesson learned is that while economic development is important it is not the end objective but rather a means to an end – that being strong and healthy communities.

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 in accordance with its modern treaty, the 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 the Tsilqot'in decision, in *William*, although only a trial decision and we are currently waiting to hear from the BC Court of Appeal, confirmed 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. We have to be mindful of what the court is saying when we consider lands and land management.

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 is critical.

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 management.

At the BCAFN we have developed a Governance Toolkit, including a Governance Report that looks at the options for First Nations governing under and beyond the *Indian Act* along a continuum. Chapter 3.19 – Land Management provides more detail about the land management initiatives and the work of the First Nations I have discussed above among others. A copy of the toolkit was sent to each First Nation and can be found on our website along with links to many of the codes and laws our Nations are making (www.bcafn.ca).

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 AANDC or Cabinet. Examples of federally led legislation currently making its way through Parliament include Bill C.27, the Accountability Act, and Bill S.2, Matrimonial Rights and Interests. There is also legislation proposed for drinking water standards.

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.

Before I close I do wish to leave you with an idea which could impact land management. For some time now an idea has been proposed in the past by various committees and Commissions for a Self-Government Recognition Act which would facilitate communities moving beyond the *Indian Act* without the interminable negotiations with Canada and Canada acting as a gatekeeper and where, I would argue, the energies and resources could be expended on community development work. In fact over the years various pieces of Self-government Recognition legislation have been introduced into the Senate by aboriginal Senators – the last being legislation Bill S-216 in the 39th Parliament. The concept is worth re-visiting and we are doing just this at the BCAFN on the direction of the Chiefs.

We need an efficient mechanism recognizing our nationhood, consistent with the state of the common law and the United Nations Declaration on the Rights of Indigenous Peoples, be put in place so that any First Nation or group of First Nations when they are ready, willing and able, can move through the post-colonial door and get out from under the *Indian Act* and re-establish their core institutions of government by developing their own constitution and voting on it - a constitution setting out the rules for determining citizenship, how the governing body is selected, the law enactment process and perhaps even the rules governing the management of lands. In many respects

such foundational work is the cornerstone to other governance reform and is really, for many First Nations, the first step on the continuum of moving out from under the *Indian Act*.

In conclusion, our 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.

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 should not be at the expense of our cultures and our peoples and our values. The benefits of taking back control of land management and creating private interests in our lands and developing property 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.

First Nations control and jurisdiction over lands and resources, whether exclusively on-reserve or settlement lands or shared over a broader traditional territory, is of critical importance not only to the future prosperity of our Peoples, but also to the future prosperity of BC and Canada as a whole. So is overall governance reform. All of us in this

room who are in some way tied to the issue of First Nations land and resource management can make a contribution towards ensuring that our First Nations' 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 management 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 with practicing and thriving cultures. Anything less our people will no doubt reject.

Gilakas'la