



BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS

***PRESENTATION TO THE UNIVERSITY OF BRITISH COLUMBIA
WATER: THE LIFE OF A COMMUNITY – A WORKSHOP ON ABORIGINAL
WATER HEALTH***

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REGIONAL CHIEF**

First Nations Longhouse - October 21, 2010

Gilakas'la, Greetings, Elders, Chiefs, ladies and gentlemen; I would like to thank you for this opportunity to speak to you today at your Water Quality Workshop 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, with my husband Tim Raybould, in my village of Cape Mudge where I also serve as a member of Council.

I appreciate the invitation to open up this workshop and speak to the important issue of water and water quality. This workshop is an opportunity to be reflective, an opportunity to connect and share ideas and is very timely given recent federal and provincial legislative initiatives relating to water and water quality.

There is no question that any discussion over water rights, water management and jurisdiction over water is complicated. In the time available I have been asked to highlight the importance and value of water in First Nations' communities, discuss some of the challenges associated with water quality and what role the university community can play in relation to First Nations' communities. I intend look at these questions in the context of what we are doing at the BCAFN in terms of Nation building or re-building and with regard to the proposed federal and provincial legislation relating to water issues.

Issues of water quality and water management are one aspect of a much broader question about how our people are governed and how we access resources. No one can disagree that all First Nations require potable water. The question is what is the best way to ensure access to water that meets our demand as well as what is the best way to regulate its delivery and its use? At its core, like so many issues, this is a question of ownership and jurisdiction. It is a question about governance.

Historically our communities were self-governing within our tribal structures prior to colonization. Each of our Nations had ways in which access to lands and resources, including water, were controlled. Our systems of government unfortunately were compromised as reserves were set aside for us and we became governed under federal authority and eventually as wards under the *Indian Act*.

Our colonial experiences have created significant challenges for us today. Firstly, it took away our system of government and control and over time created an unhealthy dependency on the federal government while at the same time not replacing our system of governance with any workable system and certainly not to standards accepted by other Canadians.

Thankfully, however, this is changing. As a result of the years of litigation and the political efforts of our past leaders there are now new opportunities for our Nations to move beyond the colonial period and walk through what I call the 'post-colonial door'...To re-establish our governance, 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. Access to water, ensuring water quality and the appropriate jurisdictions are in place are all important aspects of our Nation building or re-building process.

Prior to contact our peoples typically had abundant access to water as was needed. There were limited environmental concerns and limited pressures on most of our water sources. We lived within our means within our territories. This of course all changed when we were moved to reserves and with the increased pressures of the new settlers and their water needs.

The history of water rights in this Province is an interesting one, as it is in any area where resources over time become scarce or valuable;... how people acquired water rights and what lengths they went to acquire those rights. For us it was the federal government's responsibility to ensure that the lands set aside as reserves had adequate water supply. As provincial water laws developed over time and licences became a requirement to use water to a lesser or greater degree licences were acquired by the Indian Agents on our behalf.

Despite this history we as First Nations have consistently maintained that we have Aboriginal title and rights to water...a legal concept that continues to evolve. Clearly First Nations do have constitutionally protected Aboriginal and Treaty rights and these rights do include access to and control over water. Right to water and jurisdiction over

the distribution of water is addressed in every modern self-government agreement or treaty that has been negotiated in Canada.

Here in BC the modern treaties that have been negotiated or are being negotiated typically, where water is available, provide a water reservation to the Nation and set out rules for the management and distribution of water within the treaty settlement lands. In the self-government provisions in treaties or in stand alone self-government agreements, First Nations typically assume jurisdiction over water agreeing to meet or beat nationally accepted safe drinking water standards. However, the number of communities these arrangements affect is limited as most First Nations are still governed under the *Indian Act*.

With respect to *Indian Act* bands, there is in contrast no comprehensive federal legislative or policy framework in Canada that provides for the recognition or implementation of First Nations' jurisdiction over drinking and wastewater on First Nations' lands or for ensuring water quality generally. For the most part water management on-reserve is administered by Indian and Northern Affairs Canada under federal policy in conjunction with Health Canada. While a few of our communities have assumed jurisdiction over water management and delivery on-reserve, for the most part our communities typically only administer federal programs under contract with INAC. In the absence of a treaty or self-government there is a legislative vacuum with respect to the governance of water and standards for drinking water on-reserves. There are also related issues with respect to a lack of financial and human resources to build, maintain and operate water

and wastewater systems on reserves that are, in part, due to the deficiencies in governance, but also due to the lack of First Nations' capacity, remoteness of some communities as well as the actual amount of dollars available to build and operate water systems. I think it is safe to say as a result of this situation that water quality and water systems on-reserve are among the poorest governed and least regulated in Canada.

The results of this unacceptable situation are of course predictable. As of March 2010, 114 First Nations' communities across Canada were under drinking water advisories and 49 First Nations water systems were classified as "high risk." This is not acceptable.

After the Walkerton crisis and the ongoing issue of clean water and the lack of its regulation on-reserve, some years ago INAC embarked on a program to regulate water quality and water management on-reserves. Since then Canada has been engaged in a process to determine the best mechanism to enact water standards and what standards to be adopted. To this end Canada established an Expert Panel on Safe Drinking Water for First Nations which tabled a report in 2006 with several recommendations and options reviewed. Canada then proceeded with an "engagement process" in 2009 to obtain First Nation views on the report and approaches to be adopted to address drinking water standards on reserves.

As part of its water quality initiative, Canada has favoured developing federal legislation that would incorporate by reference provincial or territorial regulations relating to potable water and wastewater on-

reserve. For its part the BCAFN participated in an 'Impact Analysis' on having provincial water and wastewater regulations apply on-reserve and the BCAFN provided its findings to the Institute on Governance.

The Institute on Governance tabled a report that concluded that most First Nations at this time are generally nowhere near to being able to meet provincial standards. They concluded that applying these standards now would be 'calamitous' for many communities. This is a serious issue because while our citizens living in our communities demand that our water systems meet basic standards expected elsewhere across Canada, most of our governments do not have the jurisdiction, the capacity nor the resources to meet those standards. Clearly, there is no point in having standards if we cannot meet them as we will set ourselves up for failure and liability.

The real question is why can't all our communities meet basic standards and how do we work so that we all can meet them and that no community is left out or behind? As First Nations, we need to establish appropriate systems of governance over water management and distribution in our communities and ensure that we have access to the resources to meet any standards set. We need to ensure we have trained people to work in our communities, have access to capital and proper planning.

As part of its safe drinking water initiative on May 26, 2010 the federal government introduced Bill S-11 "An Act respecting the safety of drinking water on first nation lands".

From our perspective at the BCAFN the proposed legislation could be strengthened in a number of ways...a fundamental weakness of the Bill is that it does not recognize our rights and interests with the same objective of regulating the safety of drinking water and wastewater on reserve lands. As a start, the proposed Bill should provide for the recognition and implementation of First Nations' jurisdiction over drinking and wastewater on First Nations' lands and facilitate the exercise of jurisdiction or specific roles in this area by our Nations. Good governance is prerequisite to success.

A second issue we have identified in the proposed legislation is its inability to provide for the safety and protection of drinking water from the source to the tap, as source water is often located on lands that are under provincial jurisdiction. As the Government of British Columbia is also presently modernizing its water legislation which I shall get to, this would be an opportune time for dialogue among the federal government, the Government of British Columbia and BC First Nations regarding the protection of source water for First Nations' communities.

Thirdly, as we expected, the proposed Bill authorizes the referential incorporation of provincial regulations relating to the safety of drinking water into federal legislation, thereby making these provincial regulations applicable to reserve lands. Canada has not proposed to establish national standards for reserves or that First Nations' would set our own standards. The legislation authorizes the Minister to enter into agreements with the provinces to administer and enforce any regulations made pursuant to the draft Bill. The use of regulatory

making power is quicker and less public than legislation as regulations do not go through Parliament and do not involve Senate or House of Commons Committee hearings. While there are mechanisms being developed and considered for First Nations and others to engage and comment on regulations, this is less public than a hearing process. The Minister of Indian Affairs is involved recommending these regulations. The Minister of Health is also involved in the recommendation where drinking water is addressed. First Nations must have a role in recommending regulations or in having a direct involvement in their development. Outside of the fundamental need for recognition of First Nation jurisdiction, First Nations' management role and responsibilities and support for capacity development for First Nations' governments and their citizens must be addressed and supported.

Given the scope and extent of the Bill in the opinion of our lawyers some of the provisions may in fact, be inconsistent with the constitutional protection afforded to First Nations' water rights pursuant to section 35(1) of the *Constitution Act, 1982*.

Finally, the draft federal legislation has been introduced prior to completion of a national audit that is being undertaken by INAC to assess the capacity and needs for clean drinking water in First Nations' communities. Without an understanding of the existing infrastructure and current and future capacity and needs of First Nations, it will be difficult to realize the goal of ensuring the safety of drinking water to First Nations' communities. This work needs to be completed.

Ultimately from the perspective at the BCAFN how First Nations access and manage water should be addressed in the context of self-government and Nation building. Bill S-11 as with other federal acts, should, if they do make it into law, only be seen as interim until First Nations' self-government has been re-established in practice. As such, I would suggest that a transitional provision should be added to Bill S-11.

Turning now to the BC government... For its part BC as represented by Ministry of Environment is looking to modernise the BC *Water Act*. In the fall of 2009 and spring of 2010 the provincial government held workshops throughout the province with various "stakeholders" to seek input on options for water management. Legislative drafting on the *Water Act* Modernization is taking place right now.

The goals of the *Water Act* modernization process are: to protect stream health and aquatic environments; to improve water governance arrangements; to introduce more flexibility and efficiency in the water allocation system, and; to regulate groundwater extraction and use. At their core these would seem good goals that if achieved will support sustainable development and the long-term protection of the water resource.

The Province has said that it intends to "include roles for First Nations, industry, local communities and non-governmental organizations in planning and decision-making" as part of its plan to improve water governance arrangements. Again, Aboriginal title and rights and our interests as the original peoples must be properly respected and

addressed in this process as it unfolds. To ensure Aboriginal title and rights to water are respected both in terms of access to and use of water as well as our rights to govern our land and resources appropriately.

As I have already stated, First Nations do have constitutionally protected water rights. And unless any proposed revisions to the *Water Act* resulting from this initiative provides for recognition of First Nations' water rights and jurisdiction over water or for shared decision-making between the provincial government and First Nations, the draft legislation may also infringe the constitutionally protected Aboriginal and Treaty water rights of BC First Nations.

To facilitate the protection of Aboriginal and Treaty rights in BC, we have asked the Government of BC to engage in a thorough and meaningful dialogue with each of our 201 First Nations in BC as well as to undertake a legal analysis of the section 35 rights that may be adversely impacted by any proposed legislation to modernize the *Water Act*. At the end of the day these matters are a part and parcel of the broader questions around the 'land question' in BC and our need to have fair access to lands and resources.

The extent and scope of proposed federal legislation addressing the deficiencies of governance under the *Indian Act* on-reserve or the provincial legislation addressing matters that extend into our traditional territories off-reserve, does highlight the need for our Nations to systemically and comprehensively re-establish our own governments, Nation by Nation, and enact our own laws as quickly as possible. We

need to assume our rightful place in developing the policies that guide law-making that affects our lands and our peoples. While we are in an exciting period of Nation building, or Nation re-building, with many of our Nations beginning to resume control over their territories and peoples, we need to be vigilant during this transition period and ensure that in the interim all federal and provincial legislative initiatives support our Nation building agenda and do not prejudice that agenda.

Turning now to what you can do as a University Community to assist us in meeting our challenges. We need champions. We need people to advocate for social change and to help us move beyond the *Indian Act*. To help us plan for change. To train our people. To share best practices in water management and treatment. To collect data where needed, conduct research to increase awareness of our issues and our situations. There is no excuse why in Canada all citizens shouldn't have clean water.

For the First Nations' people in this room I don't need to tell you how we all share a common responsibility to help out our Nations and rebuild. For those of you who belong to a community ask yourselves what 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 your chosen field of study or work but also how you can influence opinion around the kitchen tables in your own communities? In what ways can you get involved to work with those of like mind to empower your fellow citizens to move beyond the *Indian Act*? In many communities issues like water quality may not be resolved until there are fundamental changes back home. All of us can become a part of a

growing movement for social change that our people are increasingly demanding and that is founded on implementing our hard fought for Aboriginal title and rights.

Finally we need to build partnerships and work collaboratively. We need to consider the practical on-the-ground approaches First Nations are taking with respect to water stewardship, both on- and off-reserve, to ensure greater understanding and coordination. Practically speaking, it would be beneficial to the management of collective water resources to understand how these approaches can be incorporated into broader decision-making arrangements. The relationship between First Nations' jurisdiction for water, both on-reserve and within our broader traditional territories, ownership of water, harmonization of approaches to protection and conservation and rules regarding the purveying of water (including water quality and safety), among other issues, need to be reconciled between the governments of BC, First Nations and Canada.

In closing, First Nations' people have been consistent in the portrayal of our sacred relationship with our lands and our resources including water; 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.

The preservation of our lands and resources for future generations is a sacred, inalienable trust, carried forward by each generation. This has been our way, our tradition, since time immemorial. 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." The conference title really says it all, "water: the life of a community" and we must all do what is necessary to protect this precious resource and ensure all our communities have access to clean water. Our future depends on it.