BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS

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CHECK AGAINST DELIVERY

Gilakas'la – Greetings, Elders, Chiefs, ladies and gentlemen. I would like to recognize the Mohawk territory on which we are meeting. 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, at Cape Mudge, and where I also serve on Council.

I have enjoyed today's sessions and there has been much food for thought. Thank you to the institute for the invitation. This evening I am going to talk about the exciting transformation that is taking place within our Nations and how our federation is and will become stronger for it, despite our challenges with current governments and existing policies towards our peoples. Perhaps I may be as provocative as some of the speakers earlier today...

In my opinion, the resurgence of Aboriginal governance, based on Indigenous laws and Indigenous legal traditions will, over the next generation, change the way Canada is governed – not only in transforming Indigenous Nations but our country. For I believe that truly having a third order of government in Canada with real powers and real influence will be good for the federation and for creating the proper national balance. As Aboriginal peoples take back control of our lives, so, too, will all Canadians take back control – ensuring we have a Canada that I think we all aspire to live in. A country based on shared values and principles that we have spent years as a Nation fostering – creating a caring and liberal society that until very recently ensured our place on this planet as a favoured Nation and one of the best countries in which to live.

So from an Aboriginal perspective, I want to focus on our solutions and the opportunities we have for strengthening the federation. Where, in the spirit of partnership, we look to complete the project of federalism and where the promise of federalism is enjoyed by both Aboriginal and non-Aboriginal Canadians alike.

When the fathers of Confederation came together in 1864 in Charlottetown and then again a year later in Quebec to lay out the foundation for this country, our people were not present – we were left out – this despite the early treaty-making and the many political and military alliances made with our peoples under the auspices of the Royal Proclamation of 1763 – 250 years old this year. The fact that Aboriginal peoples were left out has had far reaching implications for confederation in the tumultuous intervening years as reflected in the state of Aboriginal and non-Aboriginal relations.

Today, what we are doing, simply stated, is correcting this mistake.

Before Confederation some of our Nations, including those from this territory, indicated their assent to treaty by presenting wampum to officials of the Crown. The wampum belt stipulates that neither group will force their laws, traditions, customs or language on each other, but will coexist peacefully.

Considerable water has flowed down the symbolic river of the two row wampum belt since it was originally presented. And while we need to get back to the spirit and intent of the two row wampum, the nature of the relationship in a modern

nation state has changed. The laws of our respective peoples are not simply in their own boat or canoe, side-by-side. As the common law has evolved with new legal principles being developed, and notwithstanding the 1867 constitutional division of powers, the reality today is a Canada with multi-level governance where the federal, provincial and territorial, and now our remerging Aboriginal governments share power and decision-making between and among each other. Where, existing and evolving legal principles such as cooperative federalism, increasingly guide the complex web of authority for governments to make laws often in the same area and to actually govern effectively.

When the original framers of our Constitution met, they were, of course, not completely silent with regards to our peoples. Section 91(24) gives the federal government exclusive jurisdiction for "Indians and lands reserved for the Indians". This was to ensure that our peoples would be dealt with as a national matter in balancing the provincial quest for expansion and development with the interests of the first peoples. More treaties were contemplated.

Unfortunately after confederation the policy became one of pure assimilation not partnership. As we know, the most insidious of tools used to propagate this policy was the *Indian Act*. Rather than being citizens or members of a Nation or Tribes of Indians based on a treaty relationship as symbolized by the wampum belt, under the *Indian Act*, we were made wards of the state – the government our trustee.

Limited band council government under the *Indian Act* is not self-government and is certainly not an expression of self-determination – it is an impoverished notion

of government where the Chief and Council are really Indian Agents delivering federal programs and services. Band councils have limited authority to enact laws or make important decisions and accountability is primarily to Canada and not to those whom elect them.

In my own province of BC, for the most part, our Nations still have never entered into treaties. But the reality is, whether your Nation has an historic or pre-confederation treaty or not, we are all in the same boat – the same policies, the same *Indian Act* has applied to all of us.

Section 35 and its significance 30 years on

Since 1867, a lot has happened 'constitutionally' with respect to the recognition of our title and rights, including treaty rights. Today our challenge is not to refight the fights from 40 years ago – after all we have section 35 in the *Constitution Act* and now the UNDRIP – we have won over 170 court cases – but our challenge today is to actually translate these rights into practical benefits on the ground to improve the lives of our people. And it is in this context I now want to turn as I explore our efforts to reconcile with the Crown.

The 1982 repatriation of our Constitution, and the inclusion of section 35, was, of course, incredibly significant.

I am not sure how many of you are aware, but at the time some legal advisors to the Provinces played down the significance of section 35 arguing our continuing rights were limited and that their clients need not worry about the implications of

the provisions. For these folks, section 35 was an "empty box" that could only be populated at the will of the Crown. In other words, there really were no inherent rights at all – the constitutional division of powers had been exhausted and our people were not in the mix.

For those that had fought so vigorously for section 35 and for the Charter amendments – including my father – it was, of course, anything but an "empty box". Thirty years on – and dozens of court cases later – they have been proven right. It is our legal reality in Canada that Aboriginal Peoples do have the inherent right of self-government and that these rights survived as and, to quote the court, "one of the unwritten 'underlined values' of the Constitution outside the powers distributed to Parliament and the legislatures in 1867". They are not absolute rights but they are still very real.

So today the question is not, legally, whether there is a right of self-government but rather the question is political – how does pluralism as a result of these rights work? What makes this work challenging, and despite the case law, is that there are still deeply divergent perspectives within Canada on what the inherent right means or does not mean that distracts us from the difficult political work of reconciliation and, the related but fundamental community development work required of each of us in our communities.

Three Perspectives on Inherent Rights

There are, I think three clear and conflicting perspectives on the inherent right.

The first, and advanced by what I will respectfully call First Nation fundamentalists, is that the inherent right provides the basis for First Nations to stand alone from Canada. That is, self-government is a right of sovereignty that at its full expression could result in independence from Canada; I hope perhaps as much a response to the terrible experiences of our people within confederation at the hands of the colonial governments than a true cry for independence? Nevertheless, it is real, reactionary and aggressive – an approach that has, and could lead, to more conflict.

The second, and juxtaposed to the first, is that the inherent right does not exist at all. This perspective comes from non-Aboriginals that seek to deny Aboriginal rights and promote a greater role for assimilation of Indigenous people into the institutions and structures of non-Indigenous systems of government and society within Canada. This approach has also led to conflict and helps fuel the fire of those that share the first perspective.

The third perspective, and the one that I support, and would like to believe the vast majority of all Canadians support, is that the inherent right exists within Canada – within confederation – and, in doing so, reflects what is unique and special about the idea of Canada – that there is room in our country for different legal traditions and compromise. One where there is a full box of section 35 rights and our job as a Nation is to allow those rights to find their expression through a process of reconciliation.

Since reparation in 1982, the work of attempting to bring Aboriginal peoples more fully into Canada as partners was most public during the constitutional conferences on self-government held during the mid-80s and then in the work to amend the Constitution in 1992 through the Charlottetown Accord. Certainly with respect to Aboriginal issues, Charlottetown was, in my opinion, a missed opportunity. The power of self-government and the route to get there would have been more clearly articulated.

Charting a Path Forward

I do not know when, our country will next look to amend our Constitution – although it may be sooner than we think in light of recent events – what I know is that when we do open that door – we need to revisit Charlottetown with respect to our peoples rights. Until then – we need to support existing efforts and develop additional mechanisms to facilitate our peoples implementing their inherent right and transitioning away from the *Indian Act.*

In the wake of the "Idle No More" protests – which is a cry for us all to do better…First Nations and non-First Nations leaders alike – on January 11th, some of us, you will recall, met with Prime Minster Harper, to the sounds of drums outside his office. At the meeting, while not making too many commitments, Mr. Harper did at least agree he needed to establish a high level mechanism to oversee both the reform of the way Canada negotiates modern treaties and also implements existing ones. Accordingly Senior Oversight Committees that includes representatives from the PM's office, PCO, AANDC and the AFN were established.

The Prime Minister also agreed we needed to get rid of the *Indian Act* and he wanted solutions. We, of course, told him we have solutions.

And it is in this respect, today, I feel a sense of optimism. Why? Because, in spite of the obstacles and the challenges – federal governments come and go – there are an increasing number of Aboriginal success stories in implementing their rights and rebuilding their Nations within confederation. And we need to build on this success.

Over the last twenty years First Nations have been developing their own solutions and they are rebuilding their communities and Nations – developing their institutions of government post-*Indian Act*, some at the community level, others regional or national in scope – some a result of modern treaty-making – some not.

To document this progress, during my first term as Regional Chief, I undertook to develop a Governance Toolkit for our Nations that included a comprehensive Governance Report. The report sets out what BC First Nations are actually doing on the ground with respect to governance reform and to locate that work within the context of the current legal and political framework in which reconciliation is occurring [BCAFN Toolkit available on-line, down-loadable from our BCAFN website: www.bcafn.ca].

There are now almost 40 First Nations comprehensively governing outside of the *Indian Act* and many more involved in sectoral governance initiatives – in areas

such as land management, fiscal relations and taxation. The results of these initiatives are promising – First Nations are showing improved social and economic indicators. But the results are not even, and we need to know more about why this is so.

It is, of course, as others have suggested, not realistic to expect that each of our small communities, would be able to reinvent themselves and assume jurisdiction over the full range of subject matters that ultimately need to be governed or to the extent the inherent right provides.

Nation building, therefore, is, and will, continue to occur beyond the band typically as an aggregation of bands at the tribal level. In some cases, it will involve opting to use existing institutions and structures of government within Canada – in some cases federal, provincial or Aboriginal.

There are, in fact, now a number of national First Nations institutions providing support to our Nations including providing regulatory functions. These include the First Nations Financial Management Board. Others dealing with sectoral governance matters include the First Nations Lands Advisory Board, and the First Nations Tax Commission.

When we look at how to provide the institutional support for reemerging First Nations' government at the local level and what authority is used to create regional or national institutions, there are huge challenges. What machinery of government within Canada is needed to support this framework for First Nations

government has not been fully worked through. How institutions are established, under what authority, how they are governed and to whom they are accountable are all questions that need to be answered as we continue to experiment with shared governance bodies, Crown corporations and other special purpose bodies to support reemerging Aboriginal government.

Even more fundamental – and coming as no surprise to the people in this room – is the fact there is still no practical and efficient mechanism in Canada to facilitate a First Nation, or group of First Nations, transitioning beyond the *Indian Act* when they are ready, willing and able to do so. I know some have challenged us (particularly government officials) that many First Nations do not appear, when pushed, to want to move out from under the *Indian Act*. To which I would say this – they do, however, it is the policy of the Crown with respect to the transition that is the problem in areas such as land tenure, taxation and application of laws?

Still, while this is an interesting conversation we will continue to have, if a First Nation or a group of First Nations want to comprehensively remove itself from the clutches of the *Indian Act*, today they really only have three choices: go to court; negotiate; or simply act.

With respect to the practicality of the three choices... On the first – although the courts have said the inherent right to self-government exists, for many reasons, it is not possible for all of our Nations to go to court and test whether they have jurisdiction over a particular subject matter. With respect to the second – at the rate self-government negotiations are going it would take over 100+ years by

some accounts for all First Nations to have rudimentary governance beyond the *Indian Act* in place. Which leaves the third – where many Nations are heading as they want to have order in their community but where the Nation takes its chances – politically, legally and financially of being challenged.

This is obviously not a good situation because every First Nation needs to have the certainty of legitimate and appropriate governance to take their rightful place within federation. So creating a more efficient mechanism for the transition to self-government is a must and has been recommended in numerous reports, commissions and studies – including some done under the banner of this esteemed institution. With the support of the Chiefs in BC, I have made creating this mechanism my political priority as Regional Chief.

In the last Parliament, with the help of our friends in the Senate, we, in fact, drafted self-government recognition legislation that was introduced as a public member's bill. Our Bill, without government support, fell off the order paper. We intend to introduce a new Bill this Parliament.

Our Self-government Recognition Act would provide that, at their option, individual bands, either individually or in groups, could develop their own self-government proposal – including the Nation's constitution – and, once ratified by their citizens – would require Canada to recognize that Nation's post-*Indian Act* government. No interminable negotiations.

The powers of a 'recognized First Nation' would be similar to the powers of the current self-governing First Nations where the law-making powers or jurisdictions could be drawn down by the Nation over time. The legislation would also establish a new fiscal relationship between the recognized First Nation and the Crown – this would include taxation. And, I should add, our people are not adverse to paying tax – what we are adverse to is paying tax to the wrong government or one that is not accountable or legitimate in the eyes of our citizens.

While we continue to develop and advance our own solutions, what is very troubling to us, during this transition period, is that Canada continues to redesign our governance for us with its own legislative agenda. While we can all appreciate that some First Nations' leaders may want some of this legislation, the legislation is not, for the most part, permission and is being imposed. This is regressive, dangerous and not consistent with the direction our county has been moving, politically and legally since 1982.

The names of the governments bills, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, *An Act Respecting the Safety of Drinking Water on First Nation Lands, An Act to Enhance Financial Accountability and Transparency of First Nations,* may sound reasonable, but on closer examination are simply more examples of Canada telling us how we ought to live. While to the public these may all sound like good initiatives – they do not account for the nature of the relationship and assume that the Crown can still legislate over us at will. I have confrontationally called this "neo-colonial" when meeting both

publically and privately with the Prime Minister and am deeply afraid that the government by its actions are only fueling the fire of those Aboriginal leaders that have a more radical agenda. More importantly, they also deny our governments the ability to determine our own policy with respect to our peoples' future.

In some respects, however, I can also appreciate the government's dilemma. The tragedy of 'wardship' is that in the absence of emancipation, the colonial authority is legally bound to act in what it believes is in the best interest of its subjects. This clouds the debate on implementing Aboriginal and treaty rights and building strong and appropriate First Nations' governments. It clouds our work back home in our communities to actually develop the political support to let go of the *Indian Act*. What I have called 'fiduciary gridlock'.

Nevertheless, I am confident that we are well on our way to broader governance reform within our Nations. Self-government recognition legislation would, I know, focus the energy on community development work back home. So our people can undertake the hard work of building community trust and consensus and rebuilding governance where the citizens themselves are empowered to work through their own issues, find the solutions and take responsibility for implementing them. To aggregate and to deal where necessary with issues such as shared territory and resource development as required.

The need to complete this work will become even more pressing when the first Aboriginal title declaration is granted by the Courts.

As has been discussed today, the next big Aboriginal title case to be decided was before the Supreme Court of Canada on November 7, which perhaps more than any other case has the potential for impacting how our federation works.

The *William* case, named after Chief Roger William, the humble and unassuming leader of the Xeni Gwet'in, part of the Tsilhqot'in Nation, is the latest in the long line of BC Aboriginal title and rights cases. While being careful not to pre-judge the judgment, I can say this – to those of us in the court it seemed from the tough questioning of the Crown's lawyers, that the justices had come to the conclusion that the trial judge had properly applied their test for proving title. At the appeal level, the court found that Vickers, the trial judge, had overstretched and they sided with the Crown's arguments that Aboriginal title was far more limited and only extended to intensively used sites – essentially only small spots or postage stamps – such as salt licks or buffalo jumps.

For me what was most telling was that the bench, having apparently made up their mind on the larger track of the proven title area, was moving on to the next big question which is "what laws will apply to the title lands so proven". The answer is, of course, multi-level governance. It will be a combination of laws in accordance with the constitutional division of powers and the rules of federalism as they are evolving. It will be a combination of TNG law, provincial and federal law. And the relationship between laws will have to be addressed through reconciliation discussions among the parties.

In our self-government recognition legislation, we anticipated that at some point the courts will begin issuing declarations of Aboriginal title, and, therefore, included provisions to ensure a recognized First Nation could include Aboriginal title lands...Canada having the power to make such legislation under 91(24) to address recognized section 35 rights.

Towards a Reconciliation Policy Framework for Canada

So perhaps the first title declaration may be the impetus for true reconciliation – let us hope so.

Through the Senior Oversight Committee I talked of earlier and elsewhere we are pushing the federal government to develop a new horizontal federal "Reconciliation Framework" to guide all federal departments, negotiators and other officials tasked with reconciling with our Nations. Such a Reconciliation Framework would ensure coordination of federal policy in support of a number of reconciliation options – not just modern treaty-making.

Our aim is to have Canada eventually get rid of its outdated comprehensive claims policy altogether, the premise of which is fundamentally flawed and to move away from the idea of so-called "final agreements". We are not making claims, we are reconciling. And the process of reconciliation is ongoing, not final.

A few more thoughts before I sit down. Finishing where I started…

Reconciling with Aboriginal Peoples will, I predict, help change the way we approach government in Canada generally. We often, sometimes glibly, remark that Aboriginal government is a unique form of government – but it truly is. When you consider those Nations that are self-governing today, they typically have powers that are municipal, provincial and federal – and some that are distinctly Indigenous. It is a hybrid government. No other form of government within Canada has this range of multi-level powers – a blend of section 91 and 92 of the *Constitution Act* forged and enhanced on the strength of section 35. We are already seeing the impact of this in BC with the Nisga'a and at Westbank and Tsawwassen. And looking to the North in the Yukon.

And speaking of the North, not only is the law-making power unique, so, too, is the geographical distribution of that power. Historically, political power in Canada has rested in the south where most people live and therefore vote. In this political model, rural Canada is akin to a colony of urban Canada – urban centres exploiting the vast resource wealth. Local communities with their limited governance in rural Canada have little influence over significant public policy decisions that affect them and do not keep much of the wealth generated from resource development. Most of the wealth heads south or further afield – both in terms of taxes generated and business profits – which in the case of business profits, are increasingly heading overseas to those who own the companies that operate within our borders.

However, this is changing with re-emerging Aboriginal government…where there is real political power and real control by Aboriginal governments in their

traditional territories wherever located. Typically, people who are attached to, live on and survive off of the land they live on, take a different perspective to land management and resource exploitation than those that do not or are just passing through. This emerging political reality is already changing the way land use planning and decision-making is being conducted in my Province and as a consequence more control and more of the wealth is staying in rural BC – much of it controlled by First Nation governments and their business offshoots.

In closing let me say this. Regardless of whether I am right or wrong about my last two points, for me, and I am sure for all of you, there is no question that Canada as a whole will be a better place when our peoples are full partners within the federation. And where our distinct and rich cultures continue with an improved quality of life for our peoples with practicing and thriving cultures. It is our collective task and responsibility to promote this day. As has been said numerous times before, "We are all here to stay."

Gilakas'la.