Speech
Notes for an address by
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To the
Business Council of British Columbia
Vancouver, British Columbia
April 13, 2018

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Gilakas'la.

Thank you for that very kind introduction.

I would like to acknowledge that we are on the territories of the Musqueam, Squamish, and Tsleil-Waututh peoples.

I want to thank the BC Business Council for hosting and organizing this event, and in particular, Greg D'Avignon, the President. It is my pleasure to be here today to participate in this important dialogue. I also want to acknowledge the National Chief, all the business leaders here, and a number of other Chiefs and Indigenous leaders that I see in attendance. Welcome.

As you all know, a critical national conversation is taking place about reconciliation, the recognition and implementation of Indigenous rights, and the place of Indigenous peoples in decision-making and governance in Canada. On February 14 of this year, in a historic address, the Prime Minister made a bold statement in the House of Commons confirming that all relations with Indigenous peoples are to be based on the recognition of Indigenous rights, and that a new Recognition and Implementation of Indigenous Rights Framework will be developed. And this work has now begun with a national engagement process, being led by my colleague Minister Bennett.

Today, we are here together as part of that conversation – and, in particular, to speak about the importance of this work in building a better future for Indigenous peoples in a more inclusive Canada, and for all Canadians, the Canadian economy and resource development.

I expect that there are specific issues and topics on your minds. You want to understand how the work of reconciliation will lead to greater certainty and clarity for decision-making and economic development. You want to understand how the recognition of rights relates to how projects will be approved and what processes will look like. You have questions about Indigenous consent, and whether it will make things more or less challenging.

I imagine some of you are also thinking about specific applications of these questions – including in light of the highly publicized and challenging issues of energy development, pipeline construction, and protection of our environment – or any other number of projects. Will the recognition and implementation of rights result in a future where the current realities of conflict, tension, cost, uncertainty, and litigation that we see embroiling some projects – and which no one desires – be changed or transformed for the better?

You want to know how what we are doing today is different from what has been tried before.

It is true in the past there have been attempts to reset the relationship with Indigenous peoples – attempts at Constitutional reform, legislative initiatives, and development of new policies - again so… "what is different today?"

In brief, my message to you today is that what we are proposing is different – that by coming from a rights recognition perspective, the government of Canada is finally being proactive – and in doing so is not only transforming the status quo of how Canada operates and interacts with Indigenous peoples but is also challenging, and supporting, Indigenous communities themselves – in a positive way – to lead change, rebuild and find solutions, and take their rightful place within confederation, in ways that reflect Indigenous self-determination.

And, if I can be so bold, had the approach we are taking today been the policy some 36 years ago, we might not be where we are today – that is playing catch-up – and trying to navigate the reactive politics that uncertainty breeds. It is precisely because rights have been denied, in the misplaced belief that it was prudent to do so, that we are here - seeking to undue decades of mistrust and begin, as we should have, on a solid foundation based on the recognition of rights

So let us dive in by addressing the issue of "certainty". I think it is important to provide a definition of "certainty" at the outset, because it is so often used in different ways, and means different things to different people in different contexts.

Certainty, for me, means clarity and predictability about the basic elements of decision-making regarding lands and resources: who is making the decision, how the decisions are being made and through what process and timelines, what information and factors are relevant to the decision, and the respective roles and responsibilities of everyone involved.

To say it another way, it is about clarity with respect to jurisdiction, law-making, and authority.

Certainty, based on this definition, is something I think everyone desires – industry, Indigenous peoples and governments. However, currently, it does not exist enough.

Where it does exist in some form, it is typically through agreements between the Crown and Indigenous peoples, such as modern treaties and land claims agreements. And, there have been modern treaties – in fact over 40% of Canada's land mass, mostly in the North, is covered by modern treaties. But such agreements in BC have been few and far between, for reasons I will touch on later. And, of course, there is a long history of agreements, such as historic treaties—which could provide some certainty—not being implemented or honoured.

Another circumstance where certainty, to a degree, sometimes exists has been when leadership has been shown by industry and Indigenous peoples working together – forging relations and agreements about decision-making and partnership regarding proposed projects. Certainty is also is contributed to through initiatives like the Champions Table, a joint project of BCBC and BCAFN, where executives and Chiefs come together to develop common policy advice. But this can only go so far. Government too must act.

But beyond specific examples like these, for the most part we often live in a context of significant uncertainty. This is not good. And this is why we all have  a stake in the ambitious agenda our government has set for reconciliation based on recognition. An agenda that must be non-partisan and must survive beyond the life of any one government.

So why is certainty – which we all desire – so rare and elusive?

The answer lies in long-standing patterns and assumptions regarding Indigenous rights…which – until we understand and transform them – will continue to be detrimental to Indigenous peoples, Canadian society and the economy as a whole.

Let me explain…In Canada today, and ever since the adoption of section 35 of the Constitution in 1982, there has been a strong tendency to perceive and treat Indigenous rights differently than other rights, such as Charter rights. When we think of or speak about freedom of expression, freedom of religion, or equality… I think it is fair to say we have a deep sense that these rights are part of what makes us uniquely Canadian. We do not question the existence of these rights – rather we celebrate them.

Without question, we view these rights as expressing an important aspect of who we are, our shared values, and what binds and defines us as a diverse and democratic society. While there always will be some disagreement on the margins about the precise scope or extent of these rights, they exists in the context of a broad consensus about what these rights definitely do mean and require.

To say it another way, since 1982, when a Canadian says to its government, “I have a right to free speech”…under the Charter the response of the Canadian government has not been to say, “prove it”. Rather, governments organize themselves – their laws, policies, and operational practices – to ensure they are upholding these rights.

Indigenous rights, on the other hand, even though they were entrenched in section 35 of the Constitution at the same time as the Charter – I would argue – have never been treated or thought of in the same way as Charter rights. Since 1982, when an Indigenous Nation raises a collective right under section 35, the response of governments has been to say…“prove it”. Despite section 35 saying that Indigenous rights are “recognized and affirmed”, successive governments have explicitly chosen to not recognize or affirm them – and, in so doing, have forced conflict and confusion about Indigenous rights.

I would suggest that it is this choice – denial – that is at the heart of why we do not have certainty.

Of course, this choice did not take place in a vacuum. It has been a long-standing pattern in Canadian history of denying Indigenous peoples and their rights. This despite the fact the British Crown initially recognized Indigenous peoples and their rights in the Royal Proclamation of 1763.

By the time of Confederation in 1867, the fact that Indigenous peoples had lived on and governed the lands and resources of their territories – something affirmed in the Royal Proclamation – was not considered. This denial has manifested itself throughout Canada’s history, including through the passage and imposition of the Indian Act, the establishment of residential schools, efforts to eradicate Indigenous cultures and languages, the alienation of Indigenous peoples from their homelands and territories, and the lack of implementation of treaties, or… the failure to complete them altogether. And, of course, in the positions the Crown has historically taken in Court.

Critically important in this approach was the clear strategy by the Crown to divide up, and disempower, Indigenous nations and governments. The goal was to remove and limit the capacity of Indigenous nations to make decisions about their territories as they had always done…in order to assimilate them. This was largely accomplished through creating and imposing an administrative reality that we are still confronting today – where, in the First Nations context, there are hundreds of Indian Act bands, rather than dozens of linguistic and culturally structured Nations, meaning there are hundreds of groups – rather than dozens – representing peoples with historical and constitutionally protected rights and interests that often intersect, overlap, or interconnect with each other.

The uncertainty that we all experience today – Indigenous peoples, Industry, governments and the Crown – whether what we witness in relation to pipelines or any of a number of projects, has its roots directly in this history of denial and division.

Moving forward, this has critical implications for reconciliation. It means Indigenous nations – the proper title and rights holders – because of colonial imposition, may not be operating with political, economic, and social structures, or the resources necessary to fully discharge their responsibilities as caretakers of their lands, or a context for clear Indigenous governance, law-making, and decision-making.

The entrenchment of Indigenous and treaty rights in section 35 of the Constitution was supposed to break this pattern. However, the maintenance of a "prove it" approach by governments after 1982 made success in transforming relations extremely difficult.

We experience the effects of this denial every day.

It is at the root of the conflict and ever-increasing complexity about decision-making.

It plagues agreement-making and treaty implementation because often untenable positions are advanced.

It explains why we have so much litigation, where instead of developing a shared understanding of rights – including…crucially…the inherent right of self-government, and the jurisdiction of Indigenous laws – and implementing those through legislation, policies, and practices, as well as agreements with Indigenous Nations, we turned to the Courts as the central institution of Crown – Indigenous relations.

It has delayed the critical work of Nation building and rebuilding which is necessary so Indigenous peoples can take back control of their own affairs, make their own decisions and be, once again, responsible for their own future. Rather than investing as much as we could have in the institutions, processes, and capacity development needed for re-building Indigenous nations and governments and ultimately improving the lives of Indigenous peoples, we have all spent far too much of our limited resources and energy on conflict.

The costs of denial have been immense.

As an Indigenous woman, I know the effect of these choices directly and intimately. They have perpetuated the impoverishment and marginalization of Indigenous peoples from Canadian society – with massive impacts on both individual lives, and collective Indigenous well-being. But…they have…also been negative for Canada as a whole – socially, economically, and culturally – including in how they have

influenced our investment climate, efforts at environmental protection, and regulation of lands and resources.

So what does it take to actually build certainty?

It requires that we finally address the impediment to increased certainty by overturning its root cause—the denial of rights. This is one thing that the recognition of rights approach that our government has committed to will help accomplish.

Through the recognition and implementation of rights framework, the work of government will shift from processes primarily focused on assessing whether rights exist – which inevitably is adversarial and contentious – to seeking shared understandings about how the priorities and rights of Indigenous peoples may be implemented and expressed within a particular process, and its outcome. This shift – supported by legislative measures that help build trust that government will act according to certain transparent standards in doing this – will help create opportunities for collaboration and reduce the intensity of conflict.

This shift will also include a movement away from reliance upon and use of the courts. Not only will there be less incentives to fight, there will also be new opportunities to avoid fighting when conflict may arise.

For example, I will shortly be releasing a new litigation directive to my department regarding section 35 rights. While there will be many details of the directive worth exploring in the future – its overall orientation is most critical. It will aim to re-position Canada's legal approach to being problem solvers on the path of reconciliation, with the courts as a last resort to be turned to only in increasingly rare circumstances. This means a re-focusing of lawyers and their ways of thinking, and stronger investments in preventing and proactively resolving matters before they reach the stage of litigation. To this end, a significant emphasis will also be placed on new dispute resolution and accountability mechanisms that will help resolve matters outside of the courts.

A recognition of rights approach also includes abandoning old positions that were the main barriers to reaching broad understandings and arrangements with Indigenous peoples about how rights will be respected and implemented collaboratively. For example, Canada is abandoning its positions that treaties, agreements, and other constructive arrangements must include the extinguishment, modification, or surrender of rights – a position that has resulted in negotiations being interminably slow, or never beginning in the first place. The result of this shift is already being felt as Canada is now rapidly accelerating tables with dozens of communities and Nations based on the recognition of rights.

Perhaps most importantly, however, a shift to recognition of rights, including Indigenous self-determination and the inherent right of self-government, means that Canada will be an active supporter in the building and re-building of Indigenous nations and governments.

We will finally be active partners in supporting Indigenous Nations and governments as they do the work of defining and clarifying their constitutions, laws, and decision-making processes, the structures they will work through, and how they will govern as part of historic rights-bearing groups, including those with historic treaties.

We will also finally be partners in building with those Indigenous governments the proper inter-governmental arrangements that allows everyone to have clarity and certainty about the who, how, and what of land and resource decision-making. In short, we will support Nation building and re-building so we know who speaks for the Nation and that when the Nation does speak their voice can be relied upon.

We have already begun to reflect this approach in Bill C-69 that deals with major project reviews and impact assessment—where the legislation contemplates an increased role for Indigenous peoples in decision-making with a placeholder for what is contemplated to be forthcoming in light of the more fulsome rights recognition framework with self-governing reconstituted nations. As this legislation goes through the Parliamentary process, and is implemented it will be informed by the Recognition and Implementation of Rights Framework as we continue to work with Indigenous peoples, industry, and all Canadians, to ensure we implement new processes that build regulatory certainty and predictability, recognize and respects the rights of Indigenous peoples, as well as protecting the environment for generations to come.

To be clear then, this work of recognition is very much two-pronged. There was and is signifcant work to do for Canada to get its house in order. There is also significant work for Indigenous peoples to do. We are in a period of transition, and, as I said at the outset, we are challenging the status quo.

This work involves Nations, based on their right to self-determination, re-building and re-constituting themselves, including for First Nations re-building their own political, social, and economic structures and moving beyond the Indian Act as they determine. This is work only Indigenous peoples, Nations, and governments can lead and do. They must make the hard choices of how they want to structure and govern themselves as Nations and governments today as well as determine the laws and processes they will apply for decisions to be made.

Government must support Indigenous nations in this work—to thrive and be effective in making decisions, and caring for the well-being of their citizens. This will mean new mechanisms and tools that support their effectiveness, including a new fiscal relationship with the government.

I hope this has given you a clear vision of how I view “certainty” and how the Recognition and Implementation of Indigenous Rights Framework will advance certainty. By moving from denial to recognition—by embracing this transition—we also move from uncertainty to clarity and predictability.

This brings me to the second and related topic that I want to address briefly, that of free, prior, and informed consent, and more generally, the role of Indigenous peoples in decision-making.

I think too often “consent” is used as a rhetorical device in the context of potential conflict, or for political purposes…while too rarely do we actually have a discussion about how to pragmatically operationalize and implement it. I think consent requires a bit of de-mystification, as well as some straight talk. I have three observations to share…

First, we need to be clear that the issue of consent is not a “new” one, which has somehow arisen because of the United Nations Declaration. Consent has been noted as a matter to be addressed in Crown-Indigenous relations by the Courts for many years in the interpretation of section 35, including in cases such as Delgamuukw, Haida, and Tsilhqot’in. Indeed, in Tsilhqot’in the court in paragraph 97 recommended and encouraged shifting to “obtaining consent” as the standard for governments and

industry in relations with Indigenous peoples…regardless of whether court declarations or findings had been issued. The rationale for doing this is that it would remove the likelihood of conflict, legal struggles, and uncertainty about a project or decision.

More so, even though we have tended to use different language, de facto consent is something that both governments and industry have, over the years, sometimes realized is necessarily part of the path forward. This is one of the underlying reasons for many of the "impact and benefit agreements" that industry has properly pursued.

Second, we have tended to think about consent through the lens of the processes we currently used for consultation and accommodation, and that somehow consent involves doing what we have already been doing, with additional enhancements involving whether or not consent is achieved.

I would suggest that this is not a very helpful way of thinking about consent. Consent is not simply an extension of existing processes of consultation and accommodation, nor is the law of consultation – being heavily procedural in its orientation – a particularly practical or helpful way for thinking about how to operationalize consent. We need to see consent as part and parcel of the new relationship we seek to build with Indigenous Nations, as proper title and rights holders, who are reconstituting and rebuilding their political, economic, and social structures.

In this context there is a better way to think about consent…grounded in the purposes and goals of section 35 and the UN Declaration. Consent is analogous to the types of relations we typically see, and are familiar with, between governments. In such relations, where governments must work together, there are a range of mechanisms that are used to ensure the authority and autonomy of both governments is respected, and decisions are made in a way that is consistent and coherent, and does not often lead to regular or substantial disagreement.

These mechanisms are diverse, and can range from shared bodies and structures, to utilizing the same information and standards, to agreeing on long term plans or arrangements that will give clarity to how all decisions will be made on a certain matter or in a certain area over time. Enacting these mechanisms is achieved through a multiplicity of tools – including legislation, policy, and agreements.

The structures and mechanisms for achieving this consent, once established, are also consistent over time and across types of decisions – they are known and transparent—roles and responsibilities are defined, and they are ready to be implemented when needed. One result of this is significant certainty.

So coming back to where I began my comments – consider for a moment if we spent even a little time over the last 35 years since section 35 came into being building those structures – including, and in my mind more significantly, undertaking and supporting Indigenous Nation re-building – rather than endlessly litigating. I think we would be in a totally different place than what we are witnessing now regarding the challenges we see in project development, economic growth, and environmental protection.

I see our work of moving towards consent-based decision-making as building these structures and mechanisms of consistent, collaborative decision-making with Indigenous nations.

The recognition of rights framework we are working towards in partnership with Indigenous peoples is intended to create the legislative and policy space to do this work, and also accelerate it so that we are

not waiting another generation for this work to be substantially advanced. We cannot wait. Through the engagement process we are hearing, amongst other things, about the need for recognition legislation, the need for new institutions and supports for Indigenous nation-building, new accountability and oversight mechanisms, and new forms of dispute resolution.

The proposed rights recognition framework should not prescribe or define a new way of consulting and accommodating, or of obtaining consent, but rather should focus on establishing legislative space and standards, as well as investments in the work of building effective relations between the federal government and Indigenous governments including around how decisions are made.

Third – and building on what I have already said about nation rebuilding – this understanding of consent also clarifies that for consent to be fully operationalized as part of a relationship between governments, significant work has to be done by Indigenous nations, in addition to the federal or provincial governments.

In particular, Indigenous nations need to do work to reconstitute their nations and governments consistent with the principles in domestic law around the proper rights holder, and understandings of Indigenous peoples at international law. This is part of Indigenous peoples ensuring that Indigenous jurisdiction and authority, including the giving of consent, is being properly granted and exercised consistent with the right of self-determination. One implication of this is that consent will not be operationalized in a linear or uniform manner. It will occur in a diversity of ways, with various steps and stages being taken in different context and relationships at different times.

So…I have said a lot –I would just leave you with this before taking some questions and listening to your comments. There will inevitably be critics of this work. Some of it will come from Indigenous leadership. There were those that did not support section 35 and there were those that do not like the United Nations Declaration. But, and this is where I speak to you not as the Minister of Justice and Attorney General of Canada, but as a former Regional Chief, a former Councillor in my community, and a proud Indigenous person, I know that for the vast majority of Indigenous leaders—past and present—this has been what people have been saying needs to be done for years. These are not new ideas. They are not necessarily my ideas. So as my colleague Minister Bennett goes out and “consults” – please keep this in mind.

This is because the changes we are pursuing through the Framework have the potential to uproot longstanding obstacles and attitudes – from all quarters – that have held back Indigenous peoples, and all of Canadian society, including industry.

Uncertainty, conflict, and endless litigation are the not the result of trying to do the right thing – they are the result of trying to avoid doing the right thing for whatever political motivation.

The promise of section 35 of our Constitution is rights recognition. It is through rights recognition that we will build patterns of effective and strong Indigenous governments who are implementing increasingly stable and proper decision-making arrangements with the Crown as well as industry.

The changes to legislation and policy our government will bring forward will lay the foundation for this shift. And while the changes will not be felt overnight, in the upcoming years a new, inclusive, level of clarity and predictability will be brought to land and resource decision-making.

I look forward to carrying on this dialogue with business community in the coming months, and, in particular, witnessing the innovative ways that industry and Indigenous peoples will deepen their work together in the years to come. As the Prime Minister likes to say, better is always possible, and as we collectively take on the challenge of truly decolonizing Canada, I am confident we will continue to build a Canada that we all aspire to live in—a Canada that is prosperous, just and fair for all.

Gilakas'la.