FIRST NATIONS SUMMIT

# *Increasing First Nations' Participation in BC's Forest Industry*

Presentation by
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I would like to acknowledge the Coast Salish People on whose territory we meet.

Today I open my address with an excerpt from the June 24th, 1913 Royal Commission on Indian Affairs for the Province of British Columbia. In this document Musqueam Chief Johnny states, "*I have a few words to say yet. It is indeed true what the Chairman said, the Indian's custom of taking fish was only be the means of a small net, and they only caught by the means of a small net, and they only caught very few so as not to destroy the fish with a net only 3 feet wide. This is the reason I say that I did not destroy the fish. It is the Whiteman that brought the long nets and catches all kinds of fish. That is the reason the fish are all going away. Whenever we go out and hunt for the deer, if we get one we bring it down and use all the meat – we don't waste any of it, only the guts and the tripe is left behind. The Whiteman goes out hunting for the deer, sometime they shoot a buck and just take the horns or maybe just take the skin off and leave the meat there. It is a living for the Indians, it is a pleasure for the whites, and about the ducks it is the same way. When the Whitemen go out, they shoot all descriptions of ducks and leave them floating in the sea, but when the Indians go out shooting, they know when they have enough but the Whiteman never knows, and about the fish it is the same way. The Whitemen use a long net, and whenever they get so much fish that they cannot sell them, they throw them overboard – but the Indians do not do that whenever we get or catch fish, we know when to stop and we eat or* ***sell*** *all we catch. These are the grievances I bring before you commissioners, and I say that the food of the Indians is being seized and destroyed."*

The British Columbia Progress Board's May 13th, 2004 Interim Bench Marking Report notes:
"The Progress Board continues to believe that British Columbia possesses all the inherent attributes to become a national – and eventually global – leader. These include:

- Abundant resources and a natural beauty renowned throughout the world;
- Unique location between Europe and Asia;
- High quality infrastructure to transport goods, services, and people;
- A diverse, multicultural society and increasingly well-educated workforce; and
- Stable institutions and the rule of law."

The well being (cultural, social, economic) of any people is integrally tied to the skills, ingenuity and resources in extracting and generating wealth from the land and the resources; and the well being of the land (and the life that depends on it) depends on our understanding of, our respect for and the manner in which we use it. This dynamic and symbiotic relationship provides a context for responsible and sustainable development in our time. We need to understand and respect that there are many generations of people yet to come, who will need to provide for themselves – to meet their survival challenges – and to them

we owe a duty – to use the land (and the resources) in a respectful and sustainable way.

To this end our elders continually advise us of our responsibilities and remind us of an important order of priority:

1. protect the land;
2. rehabilitate the land when there is damage;
3. use the land wisely and respectfully.

This approach for the respect of the land is the policy foundation of the Tlingit, Haida, and First Nation interventions before the Supreme Court of Canada this past March. It is also the approach being systematically advanced at treaty negotiation tables across the province. Implicit in this is:

- there is a legitimate (and legally recognized, exercisable and enforceable) authority of First Nations people to make valid decisions about the uses of their traditional territories.
- there is an inescapable economic component to their lands and to the uses authorized on the land;
- First Nations need and support economic development on land and resources;
- This development cannot be at any cost; it must be responsible and sustainable;
- where Crown proceeds with tenure allocation, the Crown and tenure holders have legally enforceable responsibilities to respect First Nations and the decisions they make.

The legitimacy of (and the existence of) the Aboriginal rights and title of First Nations has never been properly recognized either by the federal or provincial governments. In the Tlingit and Haida appeals to the Supreme Court of Canada – in March – the policy positions advanced by the provincial and federal governments – and by supporting industry groups was premised on the denial of the existence of Aboriginal rights and title anywhere in the province – this despite the fact that the Supreme Court rulings have systematically rejected Crown extinguishment arguments. Aboriginal rights and Aboriginal title have not been extinguished in this province.

In a more recent example involving the Musqueam First Nation and their dispute over lands transferred by Lands and Water BC to the University of British Columbia, Crown lawyers legal arguments included the following: “In the instant case, it was the Crown’s view that third party use of the Golf Course Lands had effectively **obliterated** any opportunity by the Musqueam to use those same lands for traditional Aboriginal activities. However, while Aboriginal title may have existed at the time of the declaration of British sovereignty over the lands now comprising the Province of British Columbia, and Aboriginal rights may have been practiced in these same lands at the time of contact, it does not follow that such rights or title continue to exist in the present. Such rights can be

abandoned, or the land can be transformed to such an extent that these rights have essentially been expropriated."

This lies at the very heart of the First Nations – Crown dispute. It is also the greatest source of mistrust by First Nations of the Crown and its intentions. This legal uncertainty for First Nations is a major obstacle in creating effective reconciliation and positive relations between First Nations and the Crown.

If First Nations do **not** act to protect their interests, or if they do act to protect their interests, or if they negotiate or conclude interim agreements, the Crown will use these against them. Recently Chief Roger Williams advised First Nations at a gathering in Victoria that just before Christmas his community was "offered" a forest tenure (by way of a Forest and Range Agreement) by the Ministry of Forests. His community did not have the opportunity to review the tenure "offer" when on the resumption of their Aboriginal title case the Crown lawyers cross-examined them in court and told the judge of the Crown's intent to accommodate.

In the Musqueam golf course case, the Musqueam challenge to the disposition by Land and Water BC of "Crown land" pending the completion of a treaty is refuted by Crown lawyers as "simply wrong". They argue that Land and Water BC, the agency set up by the government to dispose of "Crown lands" (and certain resources) simply has no jurisdiction to act on behalf of the Crown or assume the Crown's legal obligations including that to consult with and accommodate Musqueam interests and the responsibility to negotiate in good faith. This is simply astounding! What will the result be when under the new forest legislation the responsibilities of the Crown are transferred to the forest industry?

The strategy is clear – governments will divest itself of those activities which "trigger" consultation and accommodation requirements. But what certainty will the forest industry get in this scenario? How comfortable will their investors, shareholders, board of directors, and management be? How will they disclose this to their shareholders? If this is not "without oblique motive" or "sharp dealing" on behalf of the Crown – I don't know what is.

There are similar cases involving the federal government (see Musqueam First Nation involving the Bridgeport lands).

First Nations have historically played a key and significant role relating to forest resources and today their role, though diminished by Crown operations and policy is still significant. Consider the BC Supreme Court and Court of Appeal decisions which require both the Crown and industry to consult with and accommodate First Nations legal interests – albeit, as the Crown lawyers, referred to as "pre-proof."

The first series of recommendations by the BC Business Council in their report tabled last week focus on the consultation and accommodation duties. The report notes: "The Business Council knows there is not one simple elegant solution to all of the issues and sub-issues arising from the consultation and accommodation morass." (pg. 12)

Their first recommendation underlines the fact the provincial government's approach to consultation and accommodation is not working. Though the Business Council points to some First Nations/business-industry successes they are quick to conclude the "successes we have seen do **not** solve the bigger problems…"

Though they complain about the "treaty process", the foundation of the problem the Business Council complains of certainly is not one of First Nations doing. The government says the industry is complaining about the lack of certainty and so they unilaterally develop guidelines to address consultation, accommodation, and revenue sharing. It develops tight parameters around its legal duties and includes them in their tenure documents and advances them to First Nations on a "take it or leave it basis." To their credit the Business Council, despite their arguments before the Supreme Court of Canada in Tlingit and Haida recommends that the governments should "engage First Nations…in developing a new, practical and common approach to First Nations consultation and accommodation."

The First Nations Summit approach to government to develop guidelines jointly has been rejected summarily. The Title and Rights Alliance (May 2004) review of the new forest tenures (Forest and Range Agreements) concludes that the substantial risks arising from the agreements "…must be addressed if Aboriginal and Crown title(s) are to be meaningfully reconciled and the full extent of the promises of the duty to consult and accommodate realized." (pg. 2).

Broadly, these risks include:

- Agreements place unnecessary and serious limitations on the ability of First Nations to exercise and defend Aboriginal rights and Aboriginal titles during the term of the agreement – when most of the substantial legislative initiatives come into force;
- Unreasonable (and unilateral) per capita revenue sharing formula;
- Consultation guidelines and processes unilaterally developed which fail to meet minimum legal requirements established by the courts;
- Opportunities created may not be viable (small volumes, high cost, limited log markets, etc.) to put the First Nations communities on a solid economic footing.

Many First Nations have accepted the forest tenures and signed Forest and Range Agreements in the hope of minimizing the rate of unemployment and poverty and the significant lack of opportunity. For many First Nations those

tenures and agreements, limited and minimal as they are, provide the first real opportunity to access resources from their traditional territories – and to be involved in the forest industry to build experience, skills, and capacity. But I am afraid the government's strategy will in the long run keep First Nations at the margins of the industry. There is no reason, given the fact that substantial timber resources are removed from First Nations traditional territories, that First Nations cannot be substantial and major players in the forest industry and in the economy.

Many in industry are not waiting for government. After all they also have legal obligations identified by the courts which they must meet. They have to act on these obligations. The government may be waiting for industry to make the substantial moves.

I believe that if the government abandoned its continuous denial of Aboriginal rights and Aboriginal title, abandoned their 'take it or leave it' approach, negotiated genuine revenue sharing agreements, committed to structuring tenure agreements that properly recognize and take into account Aboriginal rights and Aboriginal titles, and moved towards a compensation element for past and present takings we will have greater numbers of agreements and a higher level of success in the province.

The First Nations Summit has advanced a comprehensive "Recognition and Reconciliation Strategy" to the provincial government. We are prepared at our respective treaty negotiation tables, and where appropriate at a province-wide level, to meet both governments on these important matters.

We are concerned about the well being of our people in our respective communities. We believe that the wealth generated from our traditional territories should not be denied to our people and our communities. Our communities need access to resources, training and capital to create jobs, business opportunities and revenue. But development should not be at any cost – it must be responsible and sustainable so that while we take care of our survival needs, we are mindful and respectful of the needs of future generations and that of the land and all that which survives and depends on it.

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