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Check against Delivery

These speaking notes were prepared by The Honourable Jody Wilson-Raybould, PC, QC, MP, Minister of Justice and Attorney General of Canada, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, December 2016.

CHECK AGAINST DELIVERY

Gilakas'la. Good afternoon. Bonjour, tout le monde. You got me all teared up, Leah. Thank you for that kind introduction.

And I'm very pleased to be here this afternoon and certainly want to acknowledge the traditional territory of the Coast Salish people, the Musqueam, Squamish and Tsleil-Waututh, on whose ancestral lands we are gathered.

So the last time I had the pleasure to speak to CLESBC, the Aboriginal Law Conference was during the summer of 2010. And at the time, I was the Regional Chief of the B.C. Assembly of First Nations, and when I look around the room, there are many people here that were there. And the title of my presentation in 2010 was "Implementing Reconciliation from Law to Reality." And the words I spoke then are as entirely relevant now as they were at that time.

This afternoon, I will reflect on some of what I said in 2010 as I talk about nation rebuilding and the opportunities ahead as our government embarks on a renewed nation-to-nation relationship with Indigenous peoples. And some of my comments are contextualized in the context of British Columbia, given that I'm back here at home.

We have been in government, as Leah said, for just over a year now, and over the course of that year, it has often been repeated that no relationship is more important to our Prime Minister and our government than the one relationship with Indigenous peoples, to the point where I think there's very few people in this country that aren't aware of this. Certainly, everybody in this room is aware of that, I suspect.

To facilitate the relationship, each of the Ministers is mandated with fostering reconciliation – that is, prioritizing the need for a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Powerful words. And not surprisingly, expectations are high and so they should be.

And with such high expectations, it is also not surprising that there are some that are now questioning our government's commitment because progress has not been seen as occurring perhaps quite fast enough. But change takes time. Rome was not built in a day, and neither is rebuilding Indigenous nations. I can assure you that the commitment of our government and my commitment has not wavered and remains strong. And as I have said elsewhere, the legacy of this government will, in a very large measure, be determined by the ongoing relationship between the Crown and Indigenous peoples.

So there should be no misunderstanding. Change is coming. This is real, this is not a dress rehearsal. When our government says we are approaching the relationship based on recognition, we mean it. And this requires new way of doing business, both for government and for Indigenous peoples. As such, we are very much in a period of transition.

And the transition is not easy. It is messy, it is not simple to break free from dysfunctional colonial systems epitomized by the *Indian Act* to a true nation-to-nation relationship, one based on recognition of First Peoples and not one centred around federally-imposed band administration and power. In this transition, we all have a role to play and we all have responsibilities.

In my remarks in 2010, speaking then as Regional Chief, I suggested that for many of our people, Indigenous peoples who live on reserve, important legal instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples* and Section 35 of the Canadian Constitution and the reams of Aboriginal title and rights cases flowing from it mean very little to Indigenous people who are struggling to make ends meet. As they try to make do with the backward political chaos of *Indian Act* government and/or the confusion and contradictory relationships Indigenous peoples still have within Canada as both colonial authority and a partner.

I talked about how in some ways, it was easier in the past to divorce the actual reality of our *Indian Act* community lives from the fight for legal recognition of rights and title, where our leaders would go to Ottawa, Victoria or Vancouver, championing Section 35 and fighting vociferously for self-government, knowing that the rank and file in our communities, if asked, would vote against self-government, the majority of them afraid of life beyond the *Indian Act*, coupled with the insidious dependency on the federal government.

In this context, I questioned then what would happen if we, as Indigenous peoples, got everything we were asking for, including the right to self-government. At the time, I observed there still had not been a declaration of title. Today, of course, we now do in Chilcotin. I asked would we – again remembering speaking as a First Nations representative – be prepared to govern the day after a declaration was granted. A challenging but most welcome reality for the Chilcotin, who are dealing with this at this moment.

And today, there is a new reality for all. It is not only a changed legal landscape, but also a political one. And as hard as it might be for some to believe recognition is actually coming, let me assure you it is. And with all the questions that this raises and hard work ahead to operationalize it. And while we cannot know exactly how it will all unfold, and certainly we do not have all the answers at the outset, the nation-to-nation relationship will, I know, fundamentally transform our country. It will change Canada for the better, moving into a post-colonial world.

It will be transformative. It is how we breathe life into Section 35 and actually implement the *United Nations Declaration on the Rights of Indigenous Peoples*. Interestingly, a lot of commentary has been made about my statements earlier this year at the Assembly of First Nations in Niagara Falls, where I said that "simplistic approaches such as adopting the United Nations Declaration as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work actually required to implement it back home in communities."

Let me offer a few reflections on my statement. First, and to be very clear, and contrary to what might have been posted in social media or misreported in the media, our government has endorsed the United Nations Declaration unequivocally. What I was saying, though, is that you cannot simply incorporate the UNDRIP word for word into federal statute. Unfortunately, this has become politicized. The critical work of reconciliation, of which implementing the United Nations Declaration is a central part, must be above the daily push-and-pull of political choices, discourse and expediency.

True reconciliation has to be above politics, or rather, it has to be about a different order of politics, an order of politics that is dignified and that commits us all – Indigenous and non-Indigenous Canadians alike – to chart a future together, to be reconciled together, to make Canada whole together. This is because reconciliation demands so much of all of us – the Crown, Indigenous governments and civil society.

Reconciliation requires putting colonialism into the past, including beyond the *Indian Act*. It demands rebuilding Indigenous government and communities and in closing the socio-cultural gap

between Indigenous and non-Indigenous peoples. It involves recognizing the Indigenous relationship with the land, respecting treaties, Aboriginal title and rights and building new structures and making decisions in new ways. It is the politics of nation building.

In other words, reconciliation involves fundamental changes in the ways of talking, acting and relating that we all have to be a part of – Indigenous and non-Indigenous – for many generations, and transforming laws, policies, structures and processes that we have taken for granted for too long. We must all be nation builders. There is no single piece of legislation that can accomplish this.

While new and changed legislation will be required and will take place, we need that and far more. Implementing the *United Nations Declaration on the Rights of Indigenous Peoples* will require an interlocking set of new laws, policies, institutions, structures and patterns of relations. We must pursue those changes comprehensively. We cannot afford to invest our focus, time and energy on one initiative or approach which only meets a small part of the challenge, or gives a false sense of comfort that, really, change has occurred.

For too long, small steps and initiatives on the path of reconciliation have been misrepresented as major shifts. Now is the time, working collaboratively with Indigenous peoples, to deliberately and systematically design and implement the major changes that are needed to be transformative. Recognition and building the nation-to-nation relationship will do this.

Lastly, it is important that we always keep in mind the relationship between the United Nations Declaration and Section 35 of the Canadian Constitution. Section 35, when it was adopted, was intended to complete the critical unfinished promise of achieving reconciliation between Indigenous peoples and the Crown. For that reason, political conferences and work was to be done following the adoption of Section 35 to achieve that goal. That work did not unfold as intended.

As a result, Indigenous peoples had to continue the long, expensive and arduous path of using the courts to define how Section 35 will achieve reconciliation. That work of defining the path of reconciliation through Section 35 is ongoing. The United Nations Declaration now accelerates and provides a framework for this work, by working together at the political and community levels to implement it.

We are fulfilling the intention and the promise of Section 35, while ensuring we are upholding the minimum standards in the declaration and the fundamental human rights of Indigenous peoples. Central to the work of reconciliation is moving from conflict to collaboration and considering how we can structure our legal processes to better serve this ultimate goal. This requires grappling with how we play our roles as lawyers when and how we choose to use the courts, and what we do and say when we get there.

As lawyers, we need to consider this question from the perspective of what are the objectives of our clients and interpreting the instructions from them, and providing advice. Recognition of rights has never been the end objective in itself for Indigenous peoples, I would submit. The end objective has always been to ultimately improve the lives of Indigenous peoples, translating rights into actual practical benefits, ensuring that they are operationalized on the ground in communities.

Fifty years ago, when there was limited or no recognition of Aboriginal title and rights, the advice of lawyers working for Indigenous clients was simple: make a claim for the land, resources and governance based on the fact that no treaty had been entered into and that nation's land had not been ceded to the Crown. Central to the work of reconciliation is moving from conflict to collaboration, and considering how we can structure our legal processes to better serve this ultimate goal.

This requires grappling with how we play our role as lawyers, when and how we choose to go to court, and what we do and say when we get there, as I said before. As lawyers, of course, we have

responsibilities to faithfully and diligently serve our clients, but when working in Aboriginal law the Crown context, this service can be rendered in different ways that advance or hinder the work of reconciliation, both in that specific set of relationships and more broadly in society as a whole. For far too long, the federal government has taken positions in court that have not been aligned with reconciliation.

These positions at various times and in various ways have been rooted in notions that Indigenous peoples were uncivilized, disorganized, without laws and governments, and in some instances, did not even exist as distinct peoples. In a word, it was all about denial. One thing we are now doing in my department is to begin applying the lens of reconciliation to all positions we take, and that the choices we make on the road to and within litigation.

This is why we are beginning to find ways to recognize Indigenous peoples and Aboriginal and treaty rights, including title, create new space for solutions to be found in how we interpret the law, present the facts or frame the issues, and in some instances, seek to move matters altogether. And this is not easy. It takes time and much more needs to be done. But the work has begun and some significant changes have already been seen.

The Aboriginal Bar also has an important role to play in moving reconciliation forward. As more space emerges to find constructive solutions and ways forward that may move us out of the courts, the Aboriginal Bar has to creatively take advantage and use that space. Similarly, just as we are seeking to do in my department, in situations where we do end up in court, members of the Aboriginal Bar may also consider how to frame the issues and positions in disputes in ways that focus all of us and the court on the core issues in the dispute and make the proceedings more effective for everyone involved.

Beyond this, we all need to grapple more with the question of how. For example, we can all agree that recognition is fundamental to reconciliation. What we need to spend more time considering is how recognition is translated and implemented into tangible and real ways on the ground between governments, in communities and across Canada.

For those of you in the Aboriginal Bar, what does recognition look like in the relationship between the Crown and the nations you represent? What does it mean for how decisions are made? For the structures we have, for the ways in which the nations' government and the federal government are structured, operating and interacting, for the economic relationship of the nation and all Canadians to resources of territory. And are you in fact representing a nation as contemplated in the nation-to-nation relationship that is the proper title and rights holder?

It's important to always advance principled legal positions. We now need to be ready to articulate in real ways what the application of those principles will look like so we can work together to move from extract frameworks for reconciliation to real action. This is a responsibility we all share as lawyers working in this context. And it is in this regard and now speaking certainly as the Minister of Justice, that I see my central role. And not just ensuring that the Crown's positions in court are principled, but that our country's laws and policies actually change based on recognition to support the real action of reconciliation.

And there are numerous laws and policies that need to change and new ones to be developed. Legal and political reconciliation in furtherance of the nation-to-nation relationship is a national project that requires significant coordination and commitment at the highest level of government. For all of us at the highest level, the United Nations Declaration provides the framework for reconciliation, setting minimum standards and is instructive on how we develop our own made-in-Canada framework for reconciliation, reflecting our history and our unique legal and constitutional framework.

Above all else, this framework for reconciliation must be grounded in a commitment to principles. Those principles should not only be grounded in the law, but should also demonstrate a commitment to go beyond existing legal obligations and to strengthen the nation-to-nation relationship. Transformative change must comply with the Crown's constitutional obligations but it must go beyond them.

Transformative change requires the government to demonstrate leadership under Section 35 so that the Crown, and not only the courts, are seen to be leaders in realizing reconciliation. For example, a strong commitment to a renewed nation-to-nation relationship between the government and Indigenous peoples requires a principled approach based on the recognition and implementation of the inherent rights of Indigenous peoples. It should be acknowledged that, it should also acknowledge the centrality of the honour of the Crown in all processes.

It should understand treaties and agreements and other constructive arrangements between the Crown and Indigenous peoples are acts of reconciliation based on mutual recognition and respect, and that mechanisms for reconciliation must be developed in partnership with Indigenous peoples. These are all key principles that need to guide Crown action.

With respect to specific mechanisms to be developed to facilitate the renewed nation-to-nation relationship, there are currently no simple mechanisms for recognition in Canada that support the transition away from the colonial-imposed systems of administration – for example, the *Indian Act* – when a nation is ready, willing and able to be self-governing.

The reconciliation processes that do exist and that may eventually lead to political or legal recognition – for example, the modern treaty-making process – are contingent in that they require an agreement with the Crown for recognition, which one must assume has driven some groups to court. By some accounts, at the current pace, using existing mechanisms for political and legal recognition to support nation rebuilding – including reconciling Crown and Aboriginal title – it would take generations for all nations to move through what I like to call the post-colonial door.

This is obviously not acceptable and clearly demands a need for a more concerted effort by government with new legislative tools and other mechanisms to support transition to support nation rebuilding. This is something our government is committed to developing in partnership with Indigenous peoples. And I cannot stress this enough. As we proceed, based on recognition, it is absolutely imperative that Indigenous groups propose solutions as to how to manage the transition from the imposed systems of government and administration.

As a government, we are not going to impose solutions. And while I'm aware of solutions that are already working, but where mandates need to change and processes tweaked, I am aware of others that have been proposed over the years, but never acted upon, such as recognition legislation or the establishment of specialized dispute resolution bodies.

I know that there are other solutions and ideas out there. For example, I know some Indigenous groups are looking to work together to advance the development of new Indigenous institutions that respect but transcend the Indigenous nation. For me personally, the work of developing strong and appropriate Indigenous governance is the work of nation rebuilding that really excites me. Because as an Indigenous person, I know it is essential to ensuring thriving and practising Indigenous cultures reflective of our Indigenous legal traditions.

Indeed, Indigenous laws and legal orders are central to the work of reconciliation and creating new nation-to-nation relationships. Both Section 35 of the Constitution and the United Nations Declaration speak to this. And many of the truth and reconciliation calls to action touch on the

need to understand and engage Indigenous laws. Canada has always been a country with dimensions of legal pluralism – the coming together of different legal orders that learn to co-exist and operate together within our constitutional framework.

This was true at the founding of the country almost 150 years ago in relation to our common law and civil law heritage. Expressing dimensions of legal pluralism is a challenge we must now meet in relation to Indigenous laws, as well. Indigenous governments, the Crown, law schools and the bar all have roles and responsibilities to play in relation to how Indigenous legal orders come to be further understood and expressed in Canada.

Indigenous nations across the country are at various stages and in different processes of rebuilding their governments. This is essential work they must do as part of ushering in an era of new relationships where self-government and recognition and exercise of Indigenous jurisdiction will steadily increase. Nations must tackle the hard work of increasing their governance capacity. This includes reinvigorating and expressing in diverse and new ways the laws and legal orders that Indigenous peoples have relied on for countless generations.

They must also undertake the work of expressing their laws and their application in a contemporary world. The Crown has the opportunity to seek out and create the appropriate space for the operation and application of Indigenous laws and legal orders through changes in our own existing laws and creating new models of relations. This requires moving beyond the practice of denying the operation of Indigenous laws and starting the work of creating a pattern of legal pluralism that recognizes them and includes their role.

Law schools and the bar have vital roles to play as well. We need to systematically build understanding about Indigenous laws, how they operate, how they fit into the constitutional fabric of Canada and how their application is part of the work of reconciliation. Law schools should continue to rise to the challenge of training new lawyers equipped with the knowledge of these matters and the roles they play as lawyers in ensuring they are respected. In my position, I have been privileged to seeing this happening across the country.

Similarly, the bar as a whole has to build opportunities for gaining deep understanding of Indigenous laws in relation and relevant in various ways to all areas of contemporary legal practices. And note that, in the new open and transparent process our government has adopted for judicial appointments, to ensure greater diversity on the bench, we will strongly consider candidates with knowledge of Indigenous legal traditions.

In practice, when considering the way Indigenous laws and legal orders contribute to legal pluralism in Canada, there are many areas of the law to consider as there are many different legal traditions reflecting the diversity of Indigenous peoples within Canada. There are unique Indigenous systems of land tenure and land holding with different rules of how property is passed on and rules of descent. Nations have different traditions when it comes to how decisions are made within governing bodies, often with special rules for certain groups. For example, the rule of the matriarchs and hereditary chiefs.

In the area of family law, there may be special rules with respect to the raising and responsibilities for children that extend beyond biological parents. In some cases, Indigenous legal traditions are something that all Canadians can learn and benefit from, and that can have wider application than simply to the specific Indigenous peoples whose legal order it is – for example, with respect to how disputes are resolved.

A case in point is in the area of sentencing. Measures such as restorative justice and sentencing circles are already providing off-ramps to the criminal justice system in Canada and leading to lower incarceration rates and recidivism rates for non-violent offenses. This is, in fact, Restorative Justice Week, and I would like to acknowledge that British Columbia has been a leader in bringing restorative justice measures forward.

Indigenous legal traditions will, I am sure, increasingly have a positive impact on our country as the process of reconciliation unfolds. So, too, will the influence of Indigenous governance more broadly. For example, with respect to and use planning and natural resource development, historically – and I've said this before – political power in Canada, whether federal or provincial, has been weighted to the south where most of us live and therefore, vote. Local communities with their limited governance role in rural Canada have typically had less influence over significant public policy decisions that affect them and generally keep little of the wealth generated from resource development despite being impacted by it the most.

However, this is changing with the re-emergence of Indigenous government. People who are attached to, live on and survive off the land they live on have their own perspectives on land management and resource exploitation than can often differ from those that do not, or are just passing through or are passive investors. This developing political reality is already beginning to change the way land use planning and decision-making is being conducted across Canada and particularly here in B.C., including how governments must ensure sustainability as well as a share in revenue.

So in closing, let me say this. Today, we truly have an opportunity to develop a nation-to-nation relationship that will ensure Indigenous peoples take their rightful place within Confederation in our evolving system of multi-level governance and cooperative federalism. And as part of this Indigenous nation rebuilding, Indigenous laws and legal orders are going to play an increasingly important role in our country's legal mosaic.

As someone who was raised in the laws of our big house and now being where I am today, I can appreciate both the importance of ensuring Indigenous legal orders, including those of my people, the Kwakwaka'wakw, and ensuring legal pluralism. Through reconciliation and the promotion of legal pluralism, I am incredibly excited about the prospects of how our institutions of governance in Canada will become the stronger for it.

In my opinion, the nation-to-nation relationship and the resurgence of Indigenous governance, based on Indigenous legal orders, will, over the next generation, change for the better the way Canada is governed, not only in transforming Indigenous nations, but our country as a whole. And as Indigenous people take back control of their lives, the federation is strengthened. We are helping to ensure that we have a Canada that I think all Canadians aspire to live in – a country based on shared values and principles that we have spent years as a nation fostering, creating a fair, caring and compassionate society that confirms our place on this planet as a favoured nation and one of the best countries in the world in which to live.

It is in this special place of what must remain Canada that Indigenous nations and the future of our diverse cultures and languages will be safeguarded and, indeed, our many ways to be Canadian, our diversity.

Gilakas'la. Thank you very much.