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INTRODUCTION, COFI AND FOREST INDUSTRY DESCRIPTION

Good evening ladies and gentlemen. I welcome this opportunity to discuss some current aboriginal affairs issues with you. I also look forward to addressing your questions and comments later in the evening - which is if you are still awake and interested after listening to three perspectives on tonight's topic!

The subject of "First Nations Logging" includes a myriad of complexities involving politics; constitutional law; social values; economics; and all the usual hot-button issues that arise in any discussion of land use in BC. You may hear a variety of opinions from the three of us who are speaking and I encourage you to share your views with us as well. But I hope that at the end of the evening it will be clear that regardless of differing opinions in some areas, we all share the objective of achieving a strong, sustainable and economically successful forest industry in British Columbia.

Many of you are familiar with the Council of Forest Industries (COFI), but for those who aren't, I should explain that we are a trade association representing more than 100 forest products companies in BC. COFI is the provincial umbrella organization for the forest industry and our membership also includes six regional or product associations. They are: the BC Pulp and Paper Association; Canadian Plywood Association; Cariboo Lumber Manufacturers, Association; Coast Forest and Lumber Association; Interior Lumber Manufacturers, Association; and Northern Forest Products Association.

This audience probably doesn't need any reminders about the economic role that forestry plays in British Columbia, but I would still be remiss if I didn't include some context to set the stage for my later remarks. And as you'll see, there is a direct link between the forest industry economy and our topic tonight.

The forest sector is one of the largest employers in the province and supports about 275,000 direct and indirect jobs. That is 14% of BC's total workforce. The forest industry contributes nearly \$4 billion a year to provincial revenues - or about 20% of all annual government revenues generated in the province. And the forest industry is a significant factor in calculating the provincial Gross Domestic Product, contributing \$17 billion - or nearly 17% - of the provincial GDP.

The fact that industrial forestry is the cornerstone of the provincial economy is not surprising, considering that more than 60% of our province is covered by forests, most of which are publicly owned. And for this reason, the public policy affecting our forests and forest industry has had - and will continue to have - a dramatic impact on the social, environmental and economic future of this province.

You are probably aware that the whole scheme of public policy governing management of our forests is currently under review by the government. And though I'm not here tonight to talk about BC's Forest Policy Review Process, it is interesting to note that at

every public workshop in the review process so far, the subject of aboriginal land claims has been prevalent throughout much of the discussion. So it is obvious that we can't address one topic in isolation from the other.

Yet there is some irony in the fact that while government is engaged in a public review process to inform its decisions on forest policy; in the critical area of aboriginal policy, government action is more likely to be driven by the courts than by the wishes of the public.

COURT RULINGS INFLUENCE ABORIGINAL POLICY & FORESTERS' DECISIONS

We have all seen recent media stories on native activities or statements that revolve around court decisions. But because the sound-bite world of modern media communications does not do justice - no pun intended - to the complexities of constitutionally protected aboriginal or treaty rights, the level of comprehension among most Canadians is understandably low. In the last decade or so, aboriginal groups have successfully taken advantage of this situation to promote what many of us would say is an over-zealous interpretation of several significant rulings.

Whenever we get a new court ruling involving aboriginal rights, governments and industry tend to rely upon moderate and conservative statements with heavy emphasis on "We're still studying it "

Native groups, on the other hand, adhere to a bold strategy of declaring immediately that every judgment on aboriginal and treaty rights is a "major victory" in support of their claims. The result is that headlines blare out another "big win" for first nations, regardless of the degree to which the details and legal nuances of the judgments warrant such statements. The strategy plays well in the aboriginal community - at least for the short term - but unfortunately leads to a growing sense of anger and resentment among many non-natives.

And once the headlines fade, it also leads to resentment in the aboriginal community when no visible benefits appear as a result of the supposedly "big win."

Some of that resentment is at the boiling point in Canada and BC. We are currently in a volatile situation that is a serious concern to governments, industry and first nations.

For many of us here tonight, the jurisprudence on aboriginal rights that is evolving in Canada's courts has a direct affect on our daily lives - frequently a negative affect.

As a direct result of the Delgamuukw case, for example, the working life of virtually every practicing Registered Professional Forester (RPF) in the province began to change. Gradually at first, but now so dramatically that nearly every action or decision made by a forester, whether working for industry or government, must include consideration of complex constitutional and legal issues relating to claims of aboriginal rights and/or title affecting the land within his or her area of responsibility.

But even in the face of this huge impact that court rulings have on our work, many in the forest industry don't have a good understanding of aboriginal rights and title issues and feel powerless to deal with them in a constructive way.

This isn't a criticism, only an observation. Most foresters were not provided with legal training and probably weren't expected to deal with aboriginal rights when they were hired. Even for those who do have the legal expertise, aboriginal rights and title law is still in a relatively early stage of development and not well understood by anyone.

In the two years since the final Delgamuukw judgment in December of 1997, it appears from some inconsistencies in rulings, that even the lower courts are still grappling with what the Supreme Court was trying to say about aboriginal rights and title. The resulting confusion has dramatically increased the level of uncertainty and conflict on Crown land in British Columbia. And no one feels the pressure more strongly than those in the forest sector.

FOREST INDUSTRY FACING INCREASED UNCERTAINTY

I don't believe there is a forest company in BC today that isn't experiencing delays; escalating costs; loss of timber access; layoffs; legal fees; road blockades; or threats to equipment or future earnings, as a direct result of asserted - but unproven - claims of aboriginal rights or title. Some companies are facing all of the above!

I'm talking about companies that work in full compliance with government regulations; invest millions of dollars in mills and logging infrastructure; and provide the economic base for the communities where they operate. I'm also talking about companies that have worked diligently for years to involve their neighbouring aboriginal communities in forestry activity. Through sharing information on development plans and accommodating native activities; developing joint-ventures; hiring first nations workers or contractors; sponsoring native students for forestry training; and many other activities, the majority of forest companies in BC have invested generously in building good relationships with aboriginal communities. And if the right conditions prevail, companies will continue to do all these things.

But there are some things forest companies cannot do. They cannot settle land claims and they cannot resolve assertions of aboriginal rights or title. These are matters for governments and the courts. And if first nations continue to try to use forest companies as hostages in order to get governments to acquiesce to their demands, then the resulting damage to BC's forest industry will keep hurting everyone - native and non-native.

The forest industry in BC is still trying to recover from its worst financial year on record. We have all felt the effects of reduced government revenues from commercial forestry. Whether it is a personal experience with inadequate health care; poorly-equipped classrooms; insufficient funding for community projects; higher costs for government services; lower budgets for wildlife conservation; or a new opinion poll showing lack of confidence in the economy, the signs are everywhere that BC's economic engine is in trouble.

And in the midst of this situation, what do we have in the area of aboriginal affairs?

- increased uncertainty from land claims issues;

- direct action by aboriginal groups logging in defiance of provincial regulations; first nations,
- threats to promote international boycotts of BC forest products;
- first nations demands for money from industry accompanied by threats of blocked access to timber;
- first nations court challenges of approved harvesting permits;
- a variety of aboriginal blockades and activities to obstruct forestry development or extract concessions from industry regarding employment or some form of recognition of aboriginal jurisdiction over claimed territories; and,
- growing criticism from aboriginal groups that the treaty process is not meeting their expectations and will therefore fail.

First nations are saying loud and clear they are frustrated with the treaty process because it is slow and flawed in other ways. They claim that Delgamuukw grants them title to asserted traditional territories and many claim that provincial grants of tenure and harvesting rights are "illegal."

It is on the basis of such claims that some bands have commenced unauthorized logging on Crown land. I said earlier that there is a direct link between the economic role of forestry and tonight's topic. The link is that many aboriginal groups understand that commercial forestry generates revenue; but they believe they have been excluded from sharing in the financial benefits of BC's forestry activity.

I would argue that all BC citizens share in the forest economy because the money generated goes into government's general revenue and is applied to health and welfare, education, transportation, and other services that benefit everyone. I would also point to the numerous examples of aboriginal people who work directly in the forest industry as a sign that they are sharing in the wealth. But, as is their prerogative, a lot of first nations don't buy that argument.

Many first nations say that their claim to title over asserted traditional territories gives them the legal right to harvest timber without any authorization from anyone. And true to their strategy of proclaiming every court case a "big win," aboriginal leaders profess that court judgments support their right to log Crown timber with impunity and to retain the economic benefits for the exclusive use of their home communities.

Contrary to my usual strategy of silence, I will explain to you tonight why they are wrong.

LEGAL CONTEXT EASY TO MISINTERPRET

As you probably know, interest in the topic of "First Nations Logging" spiked this fall when Westbank Indian Band members began logging Crown timber without the required provincial authorization. The Crown issued a Stop-Work Order under Section 147 of the Forest Practices Code Act, but Westbank band members refused to comply, their legal counsel claiming that the legislation cited is unconstitutional.

In the legal skirmish that followed, certain aspects of the matter were brought to a preliminary hearing in BC Supreme Court on September 23. Justice W. H. Davies

issued his reasons for judgement five days later. The resulting media coverage of the situation was confusing and misleading. In a few minutes I will explain what happened.

Partly because I am not a lawyer, and partly because all court judgments are open to various interpretations, I tend to avoid public debates about court rulings. Speculating about what a trial judge really meant when he wrote his judgment; and then further speculating about how a future judge will apply the precedent to the next case, is about as fulfilling and conclusive as gazing into the stars and wondering about life on other planets.

Every time I go back to re-study Delgamuukw, I get frustrated with the Supreme Court Justices who foisted this cruel joke on the people of BC. The judgment is so difficult to understand; sometimes I wonder if members of the Supreme Court live on another planet! On the one hand, Delgamuukw urged the parties to negotiate to resolve their differences. The purpose of those negotiations would be, in the words of Chief Justice Lamer " the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

On the other hand, Delgamuukw plainly opened the door to far-reaching claims to aboriginal title for virtually the whole of the province.

The Delgamuukw invitation to launch far-reaching claims is having a dramatic effect on aboriginal politics in BC. As a result, we are presently in a situation where negotiations are faltering and unsubstantiated title claims threaten to dominate the agenda.

MANY ABORIGINAL CLAIMS ARE NOT SUPPORTED BY THE COURTS

On the basis of the Supreme Court's description of the content of aboriginal title and its origin, many aboriginal groups in BC are choosing to assert that they have title to vast tracts of Crown land. Built on the claims of title are claims to the right to exploit resources, such as timber. And some groups do not stop with their own claims to resources, but go the next step to claim they have jurisdiction over the land and therefore have the authority to issue - or withhold - permission for others to use the land and resources.

Delgamuukw or similar cases support none of this.

Let me give you some examples of why I say that:

Delgamuukw said that in order to establish title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time the Crown asserted sovereignty. The court describes a number of ways physical occupation may be established. But first nations insist that the province and third parties should recognize their claimed title without it being established at trial through the criteria set out by the courts. They say it is obvious that they've "occupied" their territories and therefore they have title.

But that is not supported by Delgamuukw. In his summary headnotes of the judgment, Chief Justice Lamer said: "Ultimately, the question of physical occupation is one of fact to be determined at trial."

Lamer made another reference to the need for a trial to prove title when he said that the earlier trial judge should not have excluded the territorial affidavits of the claimants on the basis that the claims were disputed. Justice Lamer said at paragraph 106: "claims to aboriginal rights, and aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts for resolution."

And a third conclusive reference to the need for a trial to determine claims appears in paragraph 109 of *Delgamuukw*. After confirming that the title case of the Gitksan *Wet, suwet, en* needed to be settled in a new trial, the Justice introduced his descriptions of the content of aboriginal title, how it is protected by s. 35 (1) and what is required for its proof with the following statement: "In order to give guidance to the judge at a new trial, it is to this issue that I will now turn."

Some first nations - and this was case with the Westbank logging situation - claim that their assertions to title should be paramount and should be presumed to exist unless and until the Crown proves otherwise. In adopting that position, Westbank legal counsel argued that the Crown must present evidence to attempt to justify what Westbank alleged was an infringement of their rights.

The court did not agree with the Westbank position. Citing *Sparrow* and *van der Peet*, Justice Davies stated at paragraph 12 of his judgment: "Past cases dealing with aboriginal rights make clear that the party asserting an aboriginal right protected by s. 35 (1) must present evidence to establish that right."

At paragraph 13, Justice Davies further cited the recent *Marshall* judgment that said: "A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian Law must first establish a treaty right that protects, expressly or by inference, the activities in question Only then does the onus shift to the government to show that it has accommodated the right or that its limitations of the right are justified."

The current status of the Westbank logging situation is as follows:

That judge said that if the band desires to challenge the constitutionality of the Forest Practices Code Act as their defense for not complying with the province's Stop Work order, that is their right, as it would be for any Canadian.

In order to pursue that defense, the band must prove that it has aboriginal rights that are unjustifiably infringed by the legislation in question.

In the meantime, the judge cannot force compliance of the Stop Work order because to do so would deny the band their right to make their preferred defense. Instead, the judge urged the band to voluntarily stop logging until their aboriginal rights petition could be heard.

He further said that if the band did not cease logging, the province should seek an interlocutory injunction.

The injunction was not necessary, however, because following the preliminary hearing the Westbank band announced it would stop logging; but the band would not agree to the province's request to commit to a permanent halt of the unauthorized harvesting as a condition to resume treaty negotiations.

I believe their treaty table is still suspended and it is not clear if or when Westbank will bring evidence of their aboriginal rights claim.

Contrary to some of the publicity surrounding this incident, the court never denied the province its ability to prevent unauthorized timber harvesting by a first nation claiming aboriginal rights - the court simply said that the proper legal tool for the province to employ in that case is an interlocutory injunction rather than a stop work order under the Forest Practices Code. I believe the province is now prepared to do that if necessary.

In the case of Westbank or any other first nation, the proposition that aboriginal people can log Crown timber without provincial authorization is not supported by Delgamuukw, or any other judgments. Even if an aboriginal right to log, or a right of aboriginal title, is established through the courts, this does not mean the exercise of those rights is above the rule of law.

At paragraph 160 of Delgamuukw, Justice Lamer says: "The aboriginal rights recognized and affirmed by s. 35 (1), including aboriginal title, are not absolute. Those rights may be infringed, both by federal and provincial governments. However s. 35 (1) requires that those infringements satisfy the test of justification."

To expand on this concept, Lamer went on to repeat his comments from the Gladstone case, where he stated at paragraph 73: "Because distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, some limitations of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation."

Justice Lamer was very clear on his confirmation that even if and when confirmed by a court, aboriginal rights or title can be limited and/or infringed by the Crown. At paragraph 165 in Delgamuukw, he said: " the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. In my opinion, the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia the building of infrastructure and settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title."

So I say again, there is no jurisprudence to support the idea that aboriginal groups can exercise a right - even if and when they've established that right - with impunity. Regulation, limitation and infringement of such rights by the Crown are firmly upheld by the court.

Quite frankly, common sense should tell us that any other approach would result in chaos and the eventual breakdown of our social fabric.

So perhaps the Supreme Court Justices aren't living on another planet after all! Perhaps some of what is needed is for the Crown to exercise its authority in a more decisive manner - recognizing of course that it may need to justify its actions if an infringement of an aboriginal right is legally established. But also recognizing that the Crown has a moral, if not a legal, obligation to preserve and represent society as a whole.

There is also the question of allegations by some first nations that title conveys the right to assert authority over the land in question - such as in the granting of permits to third parties to pursue activities on the land. This position amounts to an assertion of jurisdiction or governance and has consistently been dismissed in court rulings. In *Sparrow*, at page 404, the court said: "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands, vested in the Crown."

More recently, in *Ignace*, the BC Court of Appeal confirmed that the rule of law prevails. The court said: "no aboriginal jurisdiction superior to laws intended to govern all inhabitants of this province survived the assertion of sovereignty. Nothing in the Supreme Court of Canada's decision in *Delgamuukw* casts doubt on that reasoning"

Of particular interest to the claims of jurisdiction are statements in *Delgamuukw* that refer to the uses of title land. At paragraph 120, Justice Lamer says: "Another source of support for the conclusion that the uses to which land held under aboriginal title can be put are not restricted to those grounded in practices, customs and traditions integral to distinctive aboriginal cultures can be found in *Guerin*, where Dickson J. stated at P. 379 that the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title."

While the notion of title lands being able to serve a variety of uses may be attractive to first nations, I doubt that equating them to reserve lands has the same appeal. *Delgamuukw* goes on to say in paragraph 121: "The nature of the Indian interest in reserve land is very broad, and can be found in s. 18 of the Indian Act, which I reproduce in full: "

The relevant sections of the Indian Act which are included in the judgment confirm that the lands in question are held by the Crown for the use and benefit of the respective bands - subject to the Indian Act and all of its provisions. Those provisions, as first nations are only too aware, require the Minister's authorization for uses of the land. So even if title is proved, it in no way implies that the first nation has full control or authority over the land.

Based on all the above points, and notwithstanding the positions of some first nations, I contend that all attempts to simply assert title, jurisdiction, control over territories, etc., will ultimately fail to stand up in court in the absence of a full trial to establish title and/or

rights. And, more importantly, will fail to achieve the economic and social benefits that I believe aboriginal communities aspire to, and, I might add, that they deserve. I further contend that even if a first nation does prove title, the result will still not meet the aboriginal community's objectives. And I will expand on that in a moment.

COFI SUPPORTS NEGOTIATION TO RESOLVE ABORIGINAL RIGHTS/TITLE ISSUES

In saying this, I am not in any way trying to deny or ignore that aboriginal people have unique rights that the rest of us must acknowledge and respect. On the contrary - I am very cognizant of those rights. In fact, COFI recently sponsored a series of workshops with the Ministry of Forests to ensure that industry and ministry staff understand the potential for aboriginal rights and title and understand the fiduciary role of the Crown to engage in consultation with first nations where such issues might be affected by Crown approvals of industry activity.

But it is clear that most first nations are not satisfied with the recognition and consideration they are getting based on the "potential existence" of rights and title. And it is equally clear that government - and the courts - do not support the concept of presuming that rights or title exist in the absence of proof at trial.

From the perspective of the forest industry - the uncertainty of the present situation is totally unacceptable. So where does that leave us?

Well, my dog-eared copy of Delgamuukw has an answer to that too. And it's expressed in a way that I particularly like. Drawing on a quote from Justice Lambert, Justice La Forest concludes his comments from the Supreme Court judgment on Delgamuukw as follows: "So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. And the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years to come."

And where that leaves us is preferably at the negotiating table. Though the court did not decree that negotiations must occur in the form of treaty making, Canada's history demonstrates that treaty making would be the normal procedure. And Delgamuukw implies support for treaty making in the seldom-quoted sections of the judgment that refer to limitations on the use of land over which aboriginal title had been established.

Delgamuukw makes it clear that there are limitations on the uses to which title land can be put, but it is not at all clear how these limitations might be applied in a practical sense. That lack of clarity puts any first nation at risk in terms of utilizing title lands. Justice Lamer says at paragraph 128. "In my view, land subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place."

The court says further in paragraph 129: "The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-

economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value." As with so many of the statements in Delgamuukw, such pronouncements are open to broad interpretation and speculation. From my perspective, it is clear that title land - in the absence of further clarity from the courts - is under a cloud of uncertainty.

And I think the Supreme Court was very aware that such uncertainty could in fact prove to be a distinct disadvantage to the aboriginal community in regard to its title land. Thus Justice Lamer went on to say at paragraph 131: "Finally, what I have just said regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited in the way I have described. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those land and convert them into non-title lands to do so."

And that, ladies and gentlemen, can best be accomplished through the treaty process. In fact, the beauty of the BC treaty process is that it does not have any requirement for a first nation to prove rights or title in the comprehensive manner prescribed by the courts. Instead, without specifying location, scope or content, the Crown accepts that the first nations in treaty negotiations have some significant - though not defined - aboriginal rights.

And the negotiation process allows the parties to reach agreement on exactly what the future content and scope of those rights will be. The desirable outcome is more certainty for first nations and more certainty for all British Columbians.

Of course if a first nation chooses to try and prove rights or title in the courts, that option is always open and some may well follow that path.

But if first nations are really interested in logging - and that was the subject of our discussion - I believe the existing members of the forest industry will be far more amenable to seeing that objective achieved through treaty negotiations than through any form of litigation.

We are just as frustrated with the slowness of treaty settlements as anyone, and COFI has already taken steps to work with government to identify ways that first nations can become more involved in the industry sooner, rather than later.

We do not want to have to use our valuable human and financial resources to deal with litigation. But if court challenges are launched that threaten industry interests, we will deal with them as effectively as we can.

COFI and its member companies would rather work directly with first nations and government and focus our energy on the goal of reconciliation through negotiation. And although I said earlier it is not my objective here to address the current Forest Policy Review process, I will conclude by reiterating one of the five key changes that COFI is advocating in its submission to that process.

POTENTIAL SOLUTIONS EXIST IN COFI POLICY RECOMMENDATIONS

I draw your attention to this pamphlet "A Blueprint for Competitiveness: Five Ideas for Improving Public Policy Affecting the BC Forest Industry and the People, Businesses and Communities that Depend on it."

Item number three of the five points is: "Grow the Allowable Annual Cut." Forest research demonstrates that with proper management we can protect environmental values and still sustainably increase the amount of timber we harvest each year, instead of reducing it as some people advocate. Unless government adopts COFI's recommendation to increase the harvest over 20 years, then the most likely way for the forest industry to meet the economic objectives of first nations is by displacing existing industry interests.

We think there is a better alternative. An alternative based on a growing, thriving forest industry that continues to support today's forest-dependent communities while offering new opportunities for first nations. Opportunities made possible by increasing the volume of timber available for harvest. This alternative recognizes BC's potential to be an industry leader in sustainable commercial forestry. And this is the alternative that can create additional prosperity for all British Columbians.

I hope you will take the time to read COFI's Blueprint for Competitiveness. Whether your interest is "Native Logging" or "British Columbia Logging" the need for economic competitiveness is fundamental to us all.

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