

## RIGHTS, GOVERNANCE, AND THE BC TREATY PROCESS

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First, my thanks to Brian Mitchell and the British Columbia Treaty Commission for inviting me to be here today, and my thanks to the Coast Salish peoples for the privilege of being in your homeland.

### **Treaty Making and Nation Building**

As I understand it, this conference is one of a series of dialogues organized by the Treaty Commission from time to time to consider some of the core issues that are emerging in the process of treaty making in British Columbia. So in some sense, it's about treaties. But obviously, it's about much more than that, about things more important than treaties.

Treaties, after all, are simply tools that nations use to achieve their goals. But it's the goals that matter. It seems to me that you and your nations are engaged in, most fundamentally, is not treaty making. It's nation building. Actually, it's nation *rebuilding*, as Chief Oren Lyons of the Onondaga prefers to put it. You're engaged in a profound and colossal effort to rescue your nations from the legacies of colonialism, to reclaim your place on this land, and to reassert your voice in the major decisions about your own futures. To me, that's what this conference is about. It's about rebuilding Native nations.

Treaty making is just one part of that, a kind of laying out of a system of rights, obligations, and understandings between yourselves on the one hand, the province and the Crown on the other. But it also represents a very special kind of opportunity. The treaty process offers the opportunity not only to make a treaty, but to put in place the tools you need to exercise your rights effectively. Some of you know this better than I do, because you're doing it. You're seizing the opportunity of treaty making to build capable

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governing systems. And in doing that, you're getting even deeper into the process of nation building.

### **The Rights Challenge and the Governance Challenge**

About two and a half years ago, I had the privilege, with the help of Neil Sterritt, to host a small group of Aboriginal Australians during a visit to the United States and Canada. We took them to some American Indian nations in the southwestern U.S., and then we brought them up here to British Columbia to visit some nations here. And the topic was governance. And one of the places we visited was Nisga'a, where we went to learn something about the Nisga'a treaty—achieved outside the BC treaty process—and about the Nisga'a Lisims government. The group was received by Edmund Wright, whom many of you know, and he told us an interesting story. He talked about the twenty-plus years that it took them to achieve that treaty. He said it completely absorbed them. It was an enormous effort, requiring incredible amounts of time and energy. And they pulled it off. They got a treaty that recognized their claims to lands and their rights to govern themselves. And the day the treaty was signed, he said, they looked at each other and realized: now we've got to *govern*. We pulled it off. We have these rights in our hands. But now we've got to deliver.

And you know, he said, we really hadn't thought very much about that. We hadn't had the time. We'd been so focused on the treaty that we hadn't prepared ourselves for what would happen next. What happens the day after the treaty? And now, suddenly, we had to act like a government. We had to govern.

This is not an unusual situation. One of my colleagues at the University of Arizona is Jim Anaya. He's a professor of law there, and he's one of the leading litigators for international Indigenous rights in the world today. Not long ago, Jim won a major case in the World Court. It had to do with the rights of the Indigenous peoples of Belize—a country in Central America—to control what happens on their lands and to govern themselves. And when the court decision came down, the Indians of Belize looked at each other and said, in effect, "We won. Now what?" Like the Nisga'a, they had come face to face with the governance challenge. What do you do the day after the treaty, or the day after the court decision? Suddenly, they found themselves in the

driver's seat, and the question became, do we have in place a system that will allow us to take full advantage of the rights we've won. They were prepared to fight for their rights, but were they prepared to win? Were they prepared to govern?

You might think of it this way. At the end of the struggle for rights, for self-determination, there's a prize for the winners. It's called the governance challenge. Can you deliver for your people—not rights; you already did that. Now you have to translate rights into a good life, into solutions to problems, into wise decisions, into selfless leadership, into a better future.

The rights challenge and the governance challenge are two very different things. The rights challenge has an end point, a point at which you've either got them or you don't. You have a treaty in hand that specifies your rights. Or you have a court decision that specifies your rights. Or you have an agreement in hand that specifies your rights. Granted, that's not the whole story. Even when you have rights, you may still have to defend them. And there are plenty of enemies around. You can't relax. But once achieved, those rights are no longer the focus of your political and community life.

That's not true for governance. You don't meet the governance challenge once and for all. You meet it every day. It has no end point. It's a daily task. You have to deliver, not once, not twice, but every day. And it's not just you. It's those who come after you. They have to deliver as well, over and over and over. Will they have the tools in hand to do so? Will you give them those tools?

Furthermore, the focus of your work is no longer on some opposition out there, on some "them"—whoever "them" is: the feds, the province—that's been standing in the way of your rights. Now the focus is you. It's not on what *they* will agree to; it's on what *you* are capable of delivering. It's on what you're going to do and how you're going to do it. I'm reminded of a tribal leader in the U.S. who said to me once, "the trouble with this self-determination and sovereignty stuff is that once you've got it, you can't go around blaming the federal government for everything any more. Now it's up to you. It gets pretty uncomfortable sometimes."

Governance also turns out to be a critical piece of defending your rights. If you can't govern well, then eventually somebody will step in and take that right away from you. This is particularly a danger in the countries we live in, where there's skepticism to

begin with about whether First Nations can govern effectively. I remember another tribal leader who said to me and some colleagues, “The best defense of sovereignty is to exercise it effectively.” It’s not to go to court. It’s not to march in the streets. It’s to govern well. To govern well is the best revenge. That’s where you win not only rights, but respect and support.

So governance is the name of the nation-building game. Yes, rights matter. Toothless governance—governance with no real power—is useless governance. It’s just self-administration or self-management. But rights without capable governance are useless, too. What good is it to have a right to the land if you can’t make and implement good decisions about how the land is used? What good is it to have the right to decide what happens in your community if your community is in such disarray that it can’t decide what to do? You can have rights, but if you can’t deliver on what the rights promise, you’re dead.

### **Governance and Economic Development**

This is true in the economic arena as well. Consider two Indigenous nations. Let’s call them Nation A and Nation B. These are real nations—U.S. nations, in fact—but I’ll let them remain anonymous here. Nation A is asset-rich: it has a large land-base with diverse and ample natural resources, a large supply of educated people, a promising location for economic development, and a vibrant cultural heritage that is still apparent in language, ceremony, and social relationships. And it has the right to govern itself. But its history over the last few decades is a history of failed initiatives, failed enterprises, and persistent social problems. Not much works at Nation A. Despite its assets, it remains heavily dependent on federal funding to support its population and even to keep tribal government going. Its people, for the most part, are unemployed, mired in poverty, angry and discouraged.

Nation B has far fewer assets: a small and fragmented land-base (it’s in pieces), depleted natural resources, a location far from major markets and transportation links, and lower rates of educational achievement, although it, too, displays vibrant cultural continuities with the past. It, too, has the right to govern itself. But in contrast to Nation A, it has done very well, creating businesses and jobs in such profusion that it has to look

outside the nation for new employees. It's importing labor because there aren't enough citizens to fill all the jobs it has created. Its businesses yield significant revenues that the nation has used to build its own educational system, finance tribal police and courts, meet its people's social needs, invest in cultural and language activities, and reduce its dependence on federal funds.

What's the difference? Both nations face more or less the same legal and political environments. Both face notable amounts of racism in nearby, non-Native communities. Both nations have had talented, visionary leaders, and both have fought hard to protect and expand their rights. These factors cannot explain the different outcomes we see.

The key difference between the two nations lies in how they have organized themselves to achieve their goals. Nation A—the one in difficulty—has a constitution that provides little stability or accountability in tribal government and includes dysfunctional decision-making tools. Tribal government exhibits few links to Indigenous ideas of the appropriate organization of authority. The tribal council is like a battlefield where factions—mostly families—struggle to control federal funds and scarce jobs. Some years one extended family wins, throws those who opposed it out of office, hires its friends and relatives, and monopolizes the nation's funds, jobs, and resources. A couple of years later, another one wins, throws out the last bunch, puts in its friends and relatives, and monopolizes the goodies. Business ventures are politicized; and some disputes within the nation verge on violence. Each new administration leads to new priorities, systematic firings, and massive turnover in personnel. Frustrated by an environment of uncertainty, conflict, and recurrent failure, talented employees—most of them citizens of the nation—tire of banging their heads against the wall and move away. As a result, all those assets—the natural resources, the educated people, the promising location—go to waste.

Nation B's situation is very different. The tribal constitution provides a stable foundation for governance. It makes the rules clear so that everyone knows who has what rights and powers and how things will be done—and the rules are enforced. No one is above the law. Politics are kept in their place. People are hired on their merits. Changes in tribal administration don't lead to upheavals; there's continuity in goals and in how they are pursued. Operating in a more secure and encouraging environment, the nation's

employees are more likely to stay and to invest in their own professional development. People who moved away years ago, when things were much worse, are coming home. And the result is that, despite limited assets, the nation is thriving.

So what's the difference? The difference is governance.

### **Governance Is Fundamental**

Governance, in fact, turns out to be fundamental to everything. I often talk to foundations or to federal agencies that want to address particular issues in Indigenous communities. They're interested in health, they say, or education, or they want to organize economic development programs on reserves, start a new program of some sort. And I often say to them, have you considered the governance issues? And they say, "What do you mean by that?"

Well, let's think about it. You want talented people to run your programs, right? But how long will talented people stay on the reserve if they discover that every time there's an election and a new administration comes in, they fire half the people working for First Nations government and put their buddies in? In fact, if you don't vote for the right person, you'll lose your job, too. Would you stick around very long under those conditions? I don't think so. Or how about strategic direction? If you're running a program for the nation, wouldn't you like to know what the nation's priorities are, so that you can be sure your program is on the same page? What if the nation hasn't identified any priorities? What if the priorities change after every election? What if there are priorities but nobody pays any attention to them? Pretty soon you're likely to hunker down and just do your own thing. Or what if you discover that the nation has six different social service programs but the managers of these programs never talk to each other, there's no team-building, and everyone is just covering his or her own behind? What do you think the chances are of having a major impact under those conditions? Or let's say you set up a health care program but discover that you can't get rid of incompetent people because they have political friends in high places who will force you to reinstate them? Or let's say you're running an enterprise that's in the black, pulling in some profits, but you discover that all your profits keep getting swept by council into a black hole called the general fund that the council uses for whatever it wants, and as a result you have to

plead for funds to fix the roof or update your computer software or do the other necessary things to keep the business viable. How long will that economic development initiative last?

All of these are governance issues. If you don't address the governance problem, then you're going to have trouble solving the educational problem, or the health problem, or the economic development problem. Because all of them depend on governance. Capable governance is the foundation that underlies all of these things. Without it, they're fighting a losing battle.

### **What Is Governance?**

So what is governance? I'm going to give you a broad definition.

*Governance is how you translate the will of the nation into sustained, organized, and effective action.* The nation has a vision, a future that it wants to achieve. What do you want for your grandchildren, in this place, on this land, fifty years from now? Governance is about how you realize that vision. It refers to the principles and mechanisms a community uses to do that—to pursue its goals.

By principles I mean fundamental understandings of who the community is and what its purposes are, of the bases of authority within the community, and of the appropriate organization and use of that authority. For example, in the more traditional Pueblo nations in the southwestern U.S., a key principle of governance has to do with the primacy of the sacred and a division between sacred and secular aspects of governance. Ultimate authority within these communities rests in the hands of spiritual officers, but interactions with the outside world—the U.S. government, the state of New Mexico, school systems, etc.—are in the hands of secular leaders, one of whose primary tasks is to protect the spiritual core and sacred organization of Pueblo life from outside impositions.

Other principles may be critically important. One nation may view it as dangerous to place great power in the hands of single individuals, preferring a dispersal of power among multiple leaders, while another may view such power concentrations in single individuals as appropriate and desirable but only if those individuals have demonstrated certain abilities or values that indicate they can handle authority responsibly. Yet another nation may believe that constituent villages, districts, or kinship-based units within the

nation should have ample authority over their own affairs, echoing long-standing cultural beliefs in the right of sub-national entities to choose their own paths. And so forth. Thus the principles or values at the core of community governance may vary from nation to nation.

Ideally, however, each nation's principles are reflected in the practical mechanisms of government that each nation adopts. These may include written constitutions, designated sets of offices, legal codes, the laws the nation passes, mechanisms for enforcing those laws, procedures for getting things done, agreements with other governments, and a host of other tools that reflect these underlying principles or values but are about the practical tasks of making and implementing decisions. These are the nuts and bolts of governance.

One of the core tasks of nation building is to develop governing tools or mechanisms that reflect core principles—but that are also capable of addressing contemporary challenges and needs. Your people have to believe that these governance tools are truly theirs—not Canada's, not British Columbia's, not some nerd professor's ideas of good government—but theirs. But at the same time, you have to be realistic. Can the governing tools you have get the job done under the contemporary circumstances that you face?

### **Some Questions to Ask**

So let me close with a few questions you might want to ask yourselves as you confront the governance challenge.

Are you using the treaty process to address governance issues? My guess is most of you are in one way or another; the process asks you to, and many of you have been talking about these issues right here yesterday and today. But it's not just a question of talking about it. Let me reframe the question this way. First, will you come out of the treaty process with genuine, substantive power over what happens on your lands, the form of your own governments, the form and process of economic development on your lands, and the organization of your communities? Will you be in the driver's seat in your own affairs? If not, what's the point?

Second, are you creating the governance tools you need? Not the Indian Act. That was never conceived as an instrument of substantive governance. As John Beaucage told us last night, it was a control mechanism. Today it's a burden on First Nations. You need governance tools that are robust and that are capable of realizing your own dreams. That means constitutions, separations of powers, limits on the ability of politicians to disrupt enterprises and programs, provisions for continuity instead of upheaval whenever there's an election, and the like. These are western terms, for the most part, but you can fill them with your own ideas of what works for you, of how—in your own ways—you can be sure that the rules of governance are clear, that they're effective, and that they're followed. I sometimes think of nation building as a bit like house building. If you set out to build a house, you'd better have the right tools. They need to be well-made, precise, and durable, up to the job at hand. Well, the same is true of nation building. You'd better have a good set of tools. That's what governance is.

Third, it may be pretty late in the game to raise this issue, but have you considered the boundaries of governance? What do I mean by that? Let me give you a couple of examples, one from BC, one not. Chief Sophie Pierre is here with others from the Ktunaxa Nation. The Ktunaxa Nation decided to organize its own governance system not at the First Nation level but at what we might think of as the tribal level. Five First Nations joining together in the Ktunaxa Nation. Those five First Nations retain some powers of their own. But they are building governing institutions at a broader boundary, linking arms together, and they are going to be far stronger as a result. And they're not the only ones. This past summer I was up in the Northwest Territories, where four Tlicho communities—formerly Dogrib—have joined together to form the Tlicho government. Again, some powers remain in the hands of individual communities, but they're building something much stronger, much more potent, much more capable by joining hands to form an overarching system of governance and act as a single people. And there are others who are doing it, too.

This is a remarkable kind of nation rebuilding. It's an effort by First Nations to reconstitute the nations that were here before Canada, the nations that Canadian policy shredded into tiny postage-stamp reserves and villages—the nations Canada pulled to pieces. It's an inspiring effort. So by the boundaries of governance, I simply mean, are

there other nations with whom you share culture, language, perhaps history, even a watershed, with whom you should be linking arms, knowing that in the long run, such relationships are a source of power.

Fourth—and I'll leave you with this one—do you have the leadership you need? In our experience, good leaders have vision; we all know that. They can communicate. They're willing to work long hours. We could go through an entire list. But I want to leave you with a slightly different thought. Do you have a kind of leadership that lives what it talks about? If your leadership talks about serving the nation, is that what it actually does? Or does it serve only a portion of the nation, its own faction or family? Does your leadership obey the rules? Does it do what it expects everyone else to do?

### **Nation-Building Leadership**

I'm going to finish here with a leadership story, partly because it's illustrates what I'm talking about, and partly because it's a good story. It comes from Mike Mitchell, someone many of you I'm sure know, former Grand Chief of the Mohawk Council of Akwesasne. And it goes like this.

The Mohawk Council of Akwesasne has been engaged for some time in a major nation-building effort. One of the interesting things they've done is to search for places in the law—in provincial and Canadian law—where they might find openings in which they can assert their own decision-making and law-making powers. And one of the places they found is the area of conservation, the regulation of activities along the riverfront, animal control, and land matters. They decided that they would begin to assert their own powers in that area. How? Well, they were very smart about what they did. They developed a conservation code, a set of carefully thought-out laws. They decided they would need some conservation rangers to enforce that code. So they recruited some of their citizens to be conservation rangers. They wanted them to be professionals, but they couldn't get Ontario or Quebec to train them. So instead they sent them to the State of New York Police Academy, where they got thorough law enforcement training. But if you're going to enforce the law, you'd better have a court as well. So they set up a conservation court, and they were careful to make it look like what you'd expect a court to look like. They trained their judges, and they took the whole enterprise very seriously. In short, they

decided they were going to do this sort of thing as well as Ontario or Quebec or anybody in Canada. And they did.

Well, one evening Chief Mitchell was at a community meeting where he was talking with some citizens about these nation building efforts. And in the middle of the meeting the door opens and in walk a couple of his conservation rangers. Terrific, thinks Mike, and he introduces them to the group. And one of the rangers says, “when you’re done here, we’d like a word with you, Chief.” “Okay,” says Mike. The meeting finishes and he goes over to talk to the rangers. And they say to him, you know that neighbor of yours up there, the one who raises pigs? Well, something’s been killing some of his piglets, and he called us to investigate. We went up there, and we found a blood trail leading from his pig compound to your house, Chief. Looks like that dog of yours has been killing his piglets. Failure to control your animal is a violation of the Mohawk conservation code, Chief, and we’re going to have to cite you.

So they write out the citation, and Chief Mitchell has to appear in his own conservation court. And the court finds he violated the law, and it compels him to pay restitution to the owner of the piglets, and it fines him for the violation. So Mike has to write out a check.

Well, a little while later he finds out that the community was watching him. They had heard what had happened with the piglets, and they were wondering what the chief would do. They weren’t sure those rangers would cite him—after all, he’s the grand chief. But the rangers did. Okay, but will he show up in court, and will he pay the fine? After all, he’s the grand chief. But he showed up in court, and he paid the fine. And not long after that, a couple of community people told him they’d been watching. And they said to him, “We think you’re okay, Chief Mitchell. You’re okay.”

And Mike’s response was, “Of course I paid. *That was Mohawk law.*”

Mike told me that story, and he tells it better than I do, but to me, that’s a nation-building story. Not just the conservation code. Not just the conservation rangers and the professional training. Not just the professional court. All of those are part of nation building, and it’s to the credit of the Mohawk Council of Akwesasne that they did those things. But to me, what makes that story so important is the nation-building *leadership* that it involves. This was leadership that put the nation and its laws first, and acted

accordingly. At one stroke, Chief Mitchell sent a message to the whole of that community, and the message was that when the Mohawks pass a law, they're serious, and no one—not even the grand chief—stands above it.

That's a story about meeting the governance challenge head on. There are other stories like it, and we need more of them, and we need to hear about them. Some of you, I know, are creating stories of your own like that one. More power to you. You're nation builders in this room today, and I salute you. And I thank you for letting me share these thoughts with you.