[Title Slide: "Visions vs. Pipe Dreams: Beyond the Eyford Report"]

[Edited transcript of D. Martyn Brown's "Mel Smith Lecture", in support of companion Power Point presentation.]

[Slide 2: Thank you, Mel] Great to be here and thanks for inviting me. I had a wonderful dinner beforehand and was reminded coming here of Mel Smith. It's the reason we are here – to thank Mel and to remember him. For many of you who are students and who wouldn't ever have known or met him, I know what it's like having won a scholarship in the name of somebody else. You're grateful for it, but you really don't know a lot about the individual. Fortunately, here you've got the archives and you've got all his publications to work with. But let me tell you, there was no finer public servant that I ever worked for, with, or was impressed by, than **Mel Smith**.

When I came into politics back in the mid-80s as a young 30-something graduate of the [Legislative] Internship program, I was the research director for the then Social Credit government caucus. Bill Vander Zalm was still the Premier and Mel was still there and he taught me an awful lot. He taught me what it means to be discrete as a public servant … to serve as a professional civil servant and what it means as well to be able to give good advice and to not hold any punches. One thing about Mel, he was not shy about telling political masters what they didn't always want to hear, but what they sure *needed* to hear.

Mel, for those of you who don't know him, also went on to play an important role after his career in government. I was briefly an executive director of an organization called the Citizens' Voice On Native Claims ... It was around the [time of the] Nisga'a Treaty, before it was finalized and in the wake of the historic Delgamuukw decision from the Supreme Court of Canada … I was very involved with Mel [on that issue] … and also in his fight against the Charlottetown Accord and before that, the Meech Lake Accord [during] that period in the late '80s and early '90s … It was his passion for the files that he knew so well and that he handled that was so impressive … he was just a superb individual … super family man, a loving individual and somebody you could really, really count on. So for Jordan, I think it is terrific that you got *this* scholarship. For all of you, I really hope you do take the time to delve into and look at Mel's writings and his works, because he was a seminal character in BC history.

[Slide 3: Power of Public Service] … In addition to Mel, these are the **speakers** that you have had before. It was actually quite stunning when I looked at the list. I thought, man, you have had some great speakers, not the least of which was Nick Loenen. Nick came in during the Vander Zalm era. Shortly after I was there [as caucus research director], he became the caucus chair of the Social Credit government. Nick and I worked very closely together…

... Look at the people that you have had here and think about the contributions that they've made, collectively and individually, over the years. If you know anything about BC and Canadian political history, these folks are a stellar bunch … Preston Manning, Gordon Gibson, Ralph Klein … and others. It's just a terrific group and you should be very pleased and proud of the fact that you've got this opportunity [i.e. forum], which again, was only through the foresight and good graces of Mel.

[Slide 4: Great Canadian Visions] …You know this talk is a bit about ***visions*** and how difficult they are to turn into reality. Especially in public policy. We're not building here – as hard as it is to build – a mall, or a subdivision, or an apartment building, or things like that, that are all very visionary in their own right. [Rather,] we are talking about how to create a just society, how to build a new relationship with First Nations, and other priorities …Trust me, when you're there in government, it's a lot harder to get to the vision that you imagine than it is to come up with it in a platform document. I've written a number of those and a few bullets where you have a very broad picture of … the "promised land" – because that is really what you're being sold in politics. It's a *vision*, a picture of a destination that you would like to get to; but it's very general and generally with very little idea of how to [actually] get there.

As much as politicians or advisors like me in the past would tell you otherwise, you figure it out as you go. You just can't possibly imagine what the line is ahead of you because it is so complex in public policy. And as Thomas Edison said, "vision without execution is hallucination." It's so true. So many visions go awry because you just can't execute properly. We've seen that, with the climate change vision that Premier Campbell had. Who could have predicted that the Global economy would collapse and that virtually everybody who was so preoccupied with it would lose interest entirely with it? I think that's sad, but it's a fact. You just can't maintain the leadership needed to maintain the social license you need to develop some of these very tough and challenging policies that are often unpopular. But that is what leadership is all about.

I think Gregor Robinson is finding that out in Vancouver, as well as trying to convince people about – which I think is a very good idea – his "Greenest City" initiative, [he is] trying to keep people engaged and interested. And when you're imposing things like bike paths, and other things that aren't popular, it's challenging and it takes a lot of leadership.

Visions, to use another metaphor, are a little like that puppy in the window … we all want one and can't wait to bring the cutest one home – looks so innocent and benign – until we do. Then we are not so keen to walk them through life. We're not so keen to clean up their messes and to do the day-to-day "grunt work" that is involved with getting a public policy vision through to its fruition. And the harder a vision is to develop and maintain, the easier it is abandoned in politics.

We see that over and over again … The promises that politicians make and that governments in all of their good intentions make, so often never come to fruition because they are just too tough. They are tough legislatively and they're tough to put into policy actions that gain enough political support to see them through.

[Slide 5: Constitution Act, 1982] One big vision pertinent to Mel, of course, was his involvement in **the *Constitution Act***, in 1982. It goes … all the way back to the early sixties and to '69, with W. A. C. Bennett, and through the Victoria Charter in the early seventies … [that resulted] in the repatriation of our Charter … The Charter, for all of its flaws, was a very noble vision for a Just Society, as Pierre Trudeau called it then. Think of what it brought to our country that we didn't have. It wasn't that long ago.

[Before 1982] … we didn't have in our constitution guarantees of fundamental rights and freedoms – mobility rights, equality rights, or all these constitutional protections [listed on the slide], including for gender equality, denominational schools, Equalization, or the amending formula – how you change the constitution, [such as] we are now talking about with the possibility of senate reform and all these other things. They weren't there. So [the 1982 Constitution] was a great idea. Yet as it is with many issues, there are compromises that you have to make to get deals. And that's what it was – a national deal, negotiated behind closed doors, by politicians advised by senior civil servants.

They made compromises and they came up with … a "beautifully blind construction." It had a lot of really precise wording, where you can bet it involved officials haggling over individual words and how they would be represented. But it was also unwittingly ill-defined in many areas where they could not get agreement, or where they never imagined how judicial activism would play into it. So [in some cases] they just put words into the constitution that were not properly defined. And as a result of that, we deferred a lot of power to the courts.

I am going to talk about that for most of my remarks here, and how that has affected aboriginal rights and title, and how that is affecting our resource development in particular. Because on that file, like so many others, the Charter and the Constitution … [created] a lot of unintended consequences and actually had a lot of implications that were never imagined and that probably its founders drafters never would have accepted. Had they known that is how it would have turned out, they would have been more precise. And that is why I have said it was the ultimate act of unity, [that] brought the country together, and it also was the ultimate act of division, [that] really split the country apart. We had the Meech Lake Accord and the Charlottetown Accord referendum after that. They were very divisive and were just about how to make the constitution better. And we couldn't agree.

It was also was the ultimate act of executive federalism. As I said, it was about First Ministers – Premiers and the Prime Minister – behind closed doors, hammering out a deal. Think about that. We would never accept that in this era. It was a different era. Now, we would expect to have a *vote*. Now, *we* would expect to have a say. And we would be *right* to expect that. But that is how things were done then and I don't think we will ever see it done again. And as a result, that constitution is going to be very, very difficult to change even for things that we want and that we could get broad agreement on, because it just opens up the whole can of worms about what else could be changed if you talk about amending it. So I think that's a flaw too. No one ever dreamed we couldn't make it *better*. It's the ultimate law of our land and paradoxically, we can't fix it, we can't improve it and that's the only law of its kind, but it's the most important law that we have.

[Slides 6 & 7: Aboriginal Rights] For political scientists and others, you will be aware of these two sections [referenced on the slide]. One, … section 25 … is the section in the Charter that says nothing in the Charter can derogate from Aboriginal rights or treaty rights that exist "or may so be acquired" – a phrase that was added by proclamation in the following year [in 1983]. So the rights in the Charter that exists are largely qualified where they become applied to Aboriginal rights and similarly, under section 35, a different section of the constitution. This is the section that is fundamentally reshaping our country, because what it simply did was acknowledge that existing aboriginal and treaty rights are

"recognized and affirmed." It didn't say anything about what they were. It didn't put any limits [on those rights]. It just said that if they are there, or if they are acquired, they are affirmed and guaranteed … by the highest law of the land. All the rest that has followed has been imbued into our constitution through constitutional conventions and judgments by the courts.

A lot of that is informed by what's going on around the world. It's informed by what's happened in New Zealand, Australia and other countries particularly that also have been developing their constitutional Aboriginal rights and indigenous rights as they go. … hopefully some of you are studying that section of constitutional law at some point in your life and you might even influence it … I can tell you, not a lot is written on the subject by British Columbians compared to how important the subject is and how we should be changing the world around that subject. And we need to have a different lens on it as well.

[Slide 8: Idle No More] This year and the next couple of years is **decision time** in Canada, particularly for British Columbia and for the West. This could be a pivotal year for our country and unlike anything we've seen probably since the early eighties for how important it is. And the reason for that is just the convergence of decisions that have to be made by governments and by the courts that are going to trigger a lot of reaction, for better or worse, and a lot of that will be from First Nations.

We've got, as I've noted on the screen here, obviously the decision around the Northern Gateway, which is going to be just huge. No matter how that goes – and I expect it will be approved (it was recommended to be approved by the joint panel that reviewed it) – given the opposition to it from some corners – environmentalists and First Nations have been very vocal about it – you can bet that is going to be a flash point for a lot of on the ground political action. If things go the way that many of us would expect. And that will rub off on these other big projects like Keystone XL. That decision has got to be made by the US government.

We have heard that the State Department has just come out and found that [Keystone] won't have a negative effect on climate emissions. Because basically, [it argues], that the oil will get out through that corridor one way of the other, either by train or some other way, so it won't make things worse. But that decision is really going to be important and it may be influenced by what happens in response to the Northern Gateway decision and certainly by the Trans Mountain Pipeline from Edmonton through to Burnaby. That one is a bit of a sleeper, because the company, Kinder Morgan, has done so much of a better job, I think, in trying to manage public relations around it and to build literacy. But it is far away from a done deal and it is going to ride the crest of all the other events that actually happen.

Many of those things are pipelines *outside* of the province, like I've mentioned here, a couple that would reverse pipelines from Alberta to back East, so that we can deliver oil through to Montreal and out through the Atlantic Seaboard. Those aren't going to be without controversy from First Nations and others. They just haven't caught on yet.

The future of LNG -- the big vision for liquid natural gas that is very exciting and stands to benefit British Columbia enormously – is going to have all of the same complications and challenges that the heavy oil pipelines have, with the exception of what is flowing through the lines. That's going to be a huge challenge. The Site C decision … the big hydroelectric dam that BC Hydro is considering right now … it

has got through its environmental hearings. The Panel hasn't issued a judgment on that yet, but decisions are going to have to be made about that. That too is being opposed by First Nations in the area, [who say] that it infringes on their treaty rights. It hasn't garnered a lot of attention, partly because of the way the governments have handled issues like that.

Like the Kinder Morgan Pipeline application, they've compressed the time for public hearings and put them in through the dead of Christmas and New Years in the case of Site C, when there was not a lot of attention being paid … I don't actually think that, in the long run, that serves either the decision or the public interest. I think a lot of people would say we were never consulted, never asked, and in fact, they didn't have an adequate opportunity really to comment.

The New Prosperity Mine. You might have heard about that one in the Cariboo [involving] Taseko Mines. …When the environmental assessment was approved in British Columbia, lots of folks in the mining industry kind of raised their eyebrows ... and then the federal government environmental assessment process promptly rejected it. And in Round Two, it rejected it again. So right now, that decision is going to be made that's affecting the Tsilhqot'in people. And the Chief, Roger Williams, was also involved in the most seminal lawsuit of our times that I'm going to say talk about in a bit, called Williams vs. British Columbia. That is [currently] before the Supreme Court of Canada. How those decisions go, believe me, will provoke an awful lot of Aboriginal interest and a lot of interest from investors as well from around the world, one way or another.

And on they go. There are these other ones … [shown on the slide] that are challenging. In some cases they relate to *treaty* rights. Particularly for the Oil Sands Development in Alberta, where … for a long while, the industry felt they had numbered treaties [and] the rights were very clear and defined. They were supposed to have exhaustively defined [Aboriginal] rights and title issues. Now they're finding – because the development around the oil sands activity is encroaching … on [buffer areas] bordering on reserve lands – that a lot of people are protesting against that [development activity]. And a couple of big, big legal challenges are underway in Alberta about that, where they are asking for a 20km buffer zone from the reserve in one case. [Those cases] will have profound effects on oil sands development and also on all resource development across the country, because it will put a new standard in place about what is required to not affect treaty rights, even [on projects that are] outside of treaty territory.

So those issues are big, and of course, we have got the Fraser Surrey Docks coal transfer decision coming up in Vancouver. All these decisions combined in the next year or two are going to hit home and they are mostly in British Columbia and Alberta and they all engage First Nations. The world will be watching.

[Slide 9: Pipelines Map] …Now that is just a map of the key oil sands pipelines and LNG pipelines. There are, as you know, about 10 applications right now for possible liquid natural gas plants fed by a half a dozen pipeline proposals and the two heavy oil sands projects in British Columbia.

[Slide 10: BC's Five Conditions] You have probably heard lots about that. Like a year ago last summer, I guess it was, when Premier Clark came out with **BC's Five conditions** for considering the approval of heavy oil projects and that's had a lot of attention. It provoked an initial public relations battle with the government of Alberta, particularly around the fifth condition that *"BC receives a fair share of the*

fiscal and economic benefits … that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers." That's a sweeping comment. Alberta, I believe, was right to be nervous…

It's very popular in BC, politically, but it's just a bizarre way of thinking that you can plan for, in resource development, or for the transportation of any hazardous products across the country. And it can flow equally east as well – there are things from BC and through BC that *we* would lose royalty payments on and that *we* would lose tax revenue from. Alberta, I think, was right to be concerned about it. [Alberta] now has an agreement with BC that [its] royalties are not on **t**he table … but I suspect, if BC and Christy Clark are successful in getting the fair share that [BC] says it wants, and in defining that in the way that is written down here, it's going to come out of Alberta's pockets at the end of the day. There is just no getting around it.

The other four conditions are basically common sense. The first one, *"Successful completion of the environmental review process"*, was meant for consideration of the Northern Gateway Pipeline. Of course the joint panel has now reported and recommended that it would be in the Canadian public interest to build that pipeline. Coincidentally, though, the government that is taking that position on Northern Gateway is also taking the position in regard to the Prosperity Mine that I talked about – [a project] that was rejected by the environmental assessment process *twice* – that it should go ahead! I find that inconsistent and wrong. I think that is an inconsistent position and I don't think there is anything particularly special about heavy oil. And I think we should backstop our regulators. That's what they are *there* for. If you don't, the public loses confidence in them.

Lots of progress is being made on the other two conditions, the *"World–leading marine oil spill response, prevention and recovery systems"*; same for land. Lots of work has been done by BC, including some really good leadership from the Government of BC on that, as well with their spill task force. The report from Nuka came out on that and the Government of Canada has been responding to it as well ... the parties are trying their level best to address it.

But it is [Condition] number four that is the really big sticking one ... and this is just common sense: that *"Aboriginal and treaty rights and legal requirements are addressed."* Well they have to be, legally, of course … but saying that and doing that are two different things…

[Slide 11: The BC/Alberta Working Group] …As we know last summer, after the election the two premiers laid down their arms and became best friends again. They assigned their deputies to start working together around [the question], how do we get heavy oil and natural gas to tidewater through Alberta, through BC and out, and ship it to Asia? Because, in fact, there is no doubt that the current government does support the movement of heavy oil, even if it doesn't support Northern Gateway. And it made a pretty compelling argument as to what the flaws with Northern Gateway are from its perspective. Even though, from my perspective, Northern Gateway has really set the bar with many of its responses to environmental preparedness, with some of the improvements it's making. I'm not saying I'm supportive of the project, but it has had a much worse rep than its response to the criticisms

warrant in many cases. And that is probably what the joint panel found as well – that the responses [Enbridge] is planning for might well meet the conditions that the government has put in place with its five conditions.

[Re: First Nations] … these two recommendations I think were particularly important. One was that they *"Develop 'First Nations Engagement Principles for Energy Development and Exports' which identifies the Provinces' expectations of proponents."* That means the project proponents arranging for *"employment, training, education and service opportunities, financial support, information sharing, protocol and equity."* And then to prepare guidelines for proponents' documents that are the same for both provinces. That's a great idea, it should have already happened and in fact it could have happened if the provinces weren't battling over a war of words two years ago.

It is a sweeping statement that rightly says a lot of this activity has to be spelled out for the proponents because the governments are now asking the project proponents to do an awful lot of the legal consultation work that *they are* supposed to do. [Governments] are expecting [proponents] to do it in a way that meets [the Crown's] constitutional obligations, but they haven't really given them direction. So different companies have different protocols and guidelines, different industries do as well, and it's really a dog's breakfast. That actually doesn't stop at Alberta and BC; it is all across the country ... there is a huge need to standardize this across the country so that there is some firm direction, clarity, certainty and consistency across the country on that.

[Slide 12: LNG or Heavy Oil: Same Challenges] And like I said earlier, whether it is LNG or heavy oil, it is going to be the same challenges that apply to the vision. Politics will always be politics. You will have municipal politics, with the elections coming up next fall and that is already affecting. We have seen some of the mayors of Metro taking a position on Kinder Morgan before they even knew what the proposal entailed, but rightly and legitimately, arguably, saying that they didn't want Vancouver to become a major oil exporting port with five- or seven times the tanker traffic that it has today. That is a fair enough position, but politics enters into that.

Band politics and First Nations politics are going to play a role. The federal election in 2015 is also going to play a role and we have also seen that, whether it is the NDP and its positions – which are diametrically opposed to the Harper government's positions – people will be courting votes with these projects and visions as we saw in the last provincial election. The vision for LNG – an awful lot of people bought into it when they were sold it in a consistent, compelling way by Premier Clark.

Economics – same thing, economics are economics, commodity prices are always changing. Before these projects ever come to fruition they have to consider what's happening around the world, how many other countries are competing for the same business in Asia and China particularly, and on it goes. Anybody who thinks that LNG is going to be much a cake walk – even if we get some proponents who say they're willing to sign on the dotted line and make a deal and commit to long-term contracts to get them built – should give their head a shake. Because the Aboriginal issues along with all the others are still going to be there. Rights and title issues are going to apply equally to LNG. And the expectations,

while we don't hear a lot about them right now, are profoundly greater than I think the companies have in mind in accommodating, for the most part.

[Slide 13: Canada's own Cobra Effect.] [This] is a reference to a time during British Colonial rule in India where they had apparently – I got this from the "authority" of Wikipedia, so it must be true, but I found it interesting – it was the idea of the law of unintended consequences. Where, in that case, they had a problem with poisonous cobras and they paid a bounty to get rid of them, they paid people for dead cobras. So people started *breeding* cobras, so they could turn them in for the reward. When the government found out they were breeding them, they cut the program. Then they released all the cobras that they had been breeding and the problem got worse. The same thing happened in Hanoi with rats, apparently, where the government at the time said it was having too many problems with rats, so it would pay people for rat tails. So people started cutting off the tails of rats, but rather than kill the rats, they turned in the tails for the reward and let the rats loose in the sewers so they would propagate and create more money for themselves with new rats! So again that had the opposite effect.

In its own bizarre way, Canada has been doing the same thing I believe, with a lot of resource development. Particularly in [regard to] **earning social** license – that is, [in building] public approval, public support for these projects that is becoming more important every year because of the way that we communicate on the internet, social media and the like. You just need that public support and ongoing social license for projects to succeed. And I don't think you get there by some of the responses the government is taking to try and solve the "problem" of "criticism". You don't do it by compressing or denying meaningful public engagement, like I mentioned [regarding Site C], with consultations over a little 30-day window, over the period of Christmas and New Year's, or for that matter, [as we are seeing] right now, with Kinder Morgan.

I don't think they are doing Kinder Morgan any favours by saying you've only got 30 days [to file an application to participate in the Panel hearing process.] I don't blame the regulators, because they have legal time limits they have to meet now that don't allow them any more time, because they have to get their answers in to the government. But I don't think it will serve the purpose, because 30 days isn't very much and especially not when you read in that case – as we saw in the paper the other day – where the preferred route has changed and nobody was told about it except for the people directly affected along the way, along the pipeline. And in order to find out what the preferred route is now through Burnaby, as the paper was saying, you have to wade through some 10,000 pages of submissions to try and find where it is that the other route might happen.

Again, it's not something that is deliberately happening, but I think it is intensified by the problem of shorter time windows now with the applications for participating in these projects, which were passed by the federal government in 2012. Basically, you have to do online submissions that are very difficult to figure out, [those] online applications. You can only apply to be heard if you are directly affected, or if you have some unique knowledge or insight.

I understand that from the regulator's point of view, saying we don't have that much time to listen to everybody in the world. Yet these are projects that affect a whole lot of people, *indirectly* and even

directly. *Everybody* in British Columbia, I believe, does have an interest in the future of our oil exports, our LNG exports and other major projects of that nature that will profoundly affect our coastline, potentially, and our resource development opportunities. So I don't' think it is right what they're doing and I think they're creating a new problem as the result of that.

Same thing when you're over-the-top with your vision, as Minister Oliver was around the importance of getting heavy oil to tidewater in the early going, and over-the-top with your comments about environmentalists, as he was. You really do the project proponent no favour. … Even though you haven't said it, you leave the impression that "it doesn't matter what happens, or what advice I get, we're going to approve this." I think Steven Harper's comments around Keystone [also] reinforce that, where he said, well, "you just don't take no for an answer." That might well be his view, but I don't think that actually serves confidence in the independent regulator, who is supposed to be standing back, looking at all the evidence. And they *do* that – in making their best determination. Again, it wasn't meant to be a bad thing. But I think [those comments were] meant to have the opposite affect [they are] actually having, which is undermining confidence in those regulators.

Same thing with **science**. We have heard a lot about investments in baseline science ... with government, it's one of the easiest things to cut when you're looking for savings, because nobody notices it. But it is one of the most shortsighted things you can do. Because you need that information *over time* and in *regional* batches – like about our air sheds and water and things that don't actually observe individual projects – where you can't tell a project proponent to simply go in there, and within the course of a two- or a three-year environmental review, come up with all this science and answer all the questions because A, they don't have the time to do it; B, it's not their mandate; and C, they can't look at the broader regional impacts. Governments have an obligation, I think, to do that.

Just because we don't *like* the science that we get back sometimes and because it makes it more difficult to approve projects, does not mean we should not ask for the science. Yet more and more, that's what we are seeing. It is not just the federal government that's doing it, it is most governments, believe me, across the country. A lot of that is just because they are cash strapped, but it's shortsighted. And, similarly, with minimalizing and undervaluing **Aboriginal rights and titles**. I think we do that. We have treated them as an inconvenience in some ways, a constitutional requirement, like a hurdle that has to be overcome. And [we] still really haven't got our minds wrapped around the rights and title that [Aboriginal Canadians] *have*, or that they may have, as yet will be determined by the courts. So short-circuiting these processes will actually make the problem worse, not better, and we need to rethink that.

[Slide 14: Northern Gateway Learning Curve] I'm just going to talk briefly about **Northern Gateway** as an example. Now think about this: Enbridge, the company behind Northern Gateway, is not some fly-by-night operator who doesn't know a thing or two about earning social license. They didn't get to be Canada's largest natural gas distribution company, or operate the world's longest, most sophisticated crude oil transportation system [without that.] It is Canada's largest transporter of oil, and all the other things here: 65% of all western Canadian oil exports are from Enbridge; 13% of US daily crude imports is coming through Enbridge pipes; consistently – in all but, I think, two years in the last 10 – it has been

one of Canada's top 100 employers; consistently on the Corporate Knights' Global 100 Sustainability Index. That might sound easy but it's not, it's a really big deal for a company. So you wonder, how does a company with that pedigree windup in the situation it is now, where arguably, it is so tarnished that, in many people's minds, they just hear the words "Northern Gateway" or "Enbridge" and think they are just a bad operator?

[Slide 15: Northern Gateway] Well, obviously, they have gone through a **three-year regulatory review**, with an almost 18,000 page application process. Think about that: 17,500 pages to apply! And now Kinder Morgan has [filed] a 15,000 one, so they have saved 2,000 pages! [Northern Gateway had] a 400 page final argument that they made to the regulator; 3,600 answers to [individual info requests] according to them; over 2,000 meetings and 43 open houses with First Nations – and "you haven't consulted." You know, the world is changing and the good news for Kinder Morgan is that it gets to stand back and in many cases it has been learning from Northern Gateway's challenges. But it has also been in the shadow of it somewhat, because all the attention has been on Northern Gateway. And no wonder.

[Slide 16: Northern Gateway] The **Kalamazoo spill** was a big deal. It was the most damaging and expensive onshore oil spill in US history. The US National Transportation Safety Board characterized it as the "Keystone Cops," in [Enbridge's] response to the spill. So Enbridge learned from that. They did a bad, bad job. And with the operating history I pointed out, they were probably the most shocked of everybody, because they thought, "We know how to do this stuff. We build transportation pipelines. We build gas pipelines. We know how to get approval, all across Canada. We have been doing that for decades." But they haven't done it through BC. They haven't done it with lands that are subject to Aboriginal title claims to the same degree. And they haven't done it in *this* millennium to the same degree, where the rules have changed quite a bit in terms of how you get public license.

Of course, they had a lot of **big mistakes.** Some of them were government imposed. I mentioned the government's boosterism. Also, the federal government was very late on engaging Aboriginal leaders. It didn't really send out its deputies until a year ago. It didn't appoint Doug Eyford as its special representative on West Coast oil issues and energy issues until last March. So they were playing catch-up, and that really hurt Enbridge, actually. Enbridge certainly did mishandle Aboriginal communications and everybody has learned a lot from that. And they would be the first to admit it. They did fail to recognize that business as usual just won't cut it anymore and that has changed the ground rules. Believe me, TransCanada has found that out with Keystone XL as well. The world is different than it was five or 10 years ago. You just don't snap your fingers and get pipelines through as in the past, because they actually have to pass environmental muster and they have to gain social license.

Janet Holder is a VP at Enbridge. You've seen her on commercials recently that are a heck of a lot different than the early commercials they were running [for Northern Gateway.] They, too, have learned. They ran the usual kind of what I would call "pap" advertising, trying to sell the project without really giving people the information through their advertising that they needed. It wasn't very compelling and it had no "ownership" in BC. They changed it all, to profile Janet Holder, who has a long history in British Columbia, a knowledge of it, and a profound commitment to the province, I believe, as

well. Then things started to change. We've been seeing that in the polls, as people are becoming more literate about the project. It doesn't mean that they have got a majority support yet, they may never; but they've gained a lot more respect, I think, for it and that will change the way that Enbridge does business around the world. You can believe that.

Also, of course, they came up mid-submission with a $500 million package of improvements. And you just wonder, "Why didn't you put that in in the first place if you can improve the project by that amount to have thicker steel in your pipe and more isolation valves; so that if you do have a leak you can control it better?" The 24/7 manned remote pump stations and all those things that they added – they should have done them from the outset. But now, in fact, they've set the baseline. Now, people are going to be looking at Kinder Morgan's pipeline and saying, well what about you? And they have got it in their submission as well, but the standards are changing as people are responding. Certainly the standards for environmental protection that are going to result from the new measures, both provincially and federally, are going to profoundly effect the standards for these pipeline projects.

[Slide 17: Northern Gateway: Aboriginal Partnerships] Think about this for First Nations, what Enbridge did, what Northern Gateway did. Now it's easy to dismiss it, because they did a bad job at consulting initially. But **what's on the table?** They've got an unprecedented equity offer to share up to 10% of their entire project equity with First Nations along the way. I believe they claim they've got about 60% of First Nations signing on, but we don't know who they are, because they don't want to be outed. But it's nearly $300 million [in available equity] and they are providing loan guarantees to the First Nations that they wouldn't be liable for personally in the same way that normal directors would, but that they will have to repay out of their revenue earnings. So very low risk, high rewards that they are offering.

Fifteen of the 18 offers in Alberta, they say, were accepted. Eleven of 22, they claim, were accepted in BC. Mostly it is towards the coast that they were not accepted, so it's a very, culturally specific thing. Fifteen of 18 in Alberta accepted, where the treaty First Nations there are obviously more familiar with the oil sands developments and pipelines, and have more confidence, and they are benefiting from it. But as I noted earlier, we are seeing some now they are challenging. They just don't like what it is doing to their quality of life, even though they are benefiting from it – they are benefiting from Aboriginal [businesses, employment & training, housing, community amenities and more].

Again, $300 million Enbridge is setting aside to purchase goods and services from Aboriginal businesses; $300 million more for benefits, they claim, for Aboriginal workers in construction in the Kitimat area for the project. It's a huge economic benefit, at least in the short run. But many First Nations are just opposed to it, because it affects their rights, in their minds. They are worried about the environmental risks. And they also have title claims. I'm going to get to that in a second, but this, I think, is at the root of a lot of it: it is that there are *title* claims. And title, don't forget, is an absolute interest in land – it is ownership – including what you can do with it. And title claims could dramatically affect, not only Northern Gateway, but also the other pipelines, projects, LNG projects as well. Because First Nations may decide that if they have an argument for title, and a line has to pass through [that territory], they would have a lot better leverage to get way more than what is on the table even with this offer, which is actually unprecedented.

[Slide 18: NEB Joint Review Panel Report] Let's remember what the **National Energy Board Joint Review Panel** said about Aboriginal issues as well, of course. As I said, they recommended approving the project, saying that, on balance, it is in the public interest. Whether we know this or not, or believe it or not, this was their conclusion: that, *"We found that, during construction and routine operations, the project would not have a significant adverse effect on the ability of Aboriginal people to use the lands, waters, and resources in the project area for traditional purposes…"* That's a pretty broad statement.

They found … there would be adverse effects – not significant adverse effects – but adverse effects associated with the project, but that they would be temporary. And in the unlikely event of a large oil spill, similarly, as they concluded generally, if there are significant adverse effects in their estimation they would be temporary. So they said despite the inherent risks – not to be underestimated – they are manageable risks and unlikely risks and temporary ones. I don't suppose too many First Nations along the way would agree, or anybody that is opposed to the project would agree with that, but here's what we should think about.

[Slide 19: Trouble Comes In Torrents] I've mentioned all those other decisions that have to come up this year and next year. When I came into work for the Vander Zalm government, when Nick was there in the late '80s and the like, we had the Oka crisis. A lot of you guys probably don't remember it, but it was a big deal in Canada and it literally brought the nation to its knees. We had 15 roadblocks in the summer of 1990 in British Columbia and they were not just oppositional. We were lucky we didn't have violence and we were lucky that, as far as I can recall, I don't think there was any injury or loss of life in those ones. Same thing with Apex-Alpine Ski Resort when that protest went on. I remember Stewart Phillip, who was Chief of the Penticton Band still – people dressed in camouflage fatigues and armed people on the sides of the road. It was serious and it changed what happened there. And on it went.

We had Ipperwash, in Ontario, where there was a loss of life. It was a terrible incident. And Gustafson Lake, which went on for a long time in the summer of '95, along with Douglas Lake and Adams Lake. Those were blockades. The NDP was in government then, Ujjal Dosanjh was the Attorney General, and it was a terrible situation … the RCMP are very reluctant to go in, in these situations, and simply get people to "move on." And, in fact, we have had incidents .. where the courts have been very frustrated, because their directives for the RCMP to go in there and enforce the law have been ignored. And they [the RCMP] do that in the interest of public safety.

We had all those incidents in 1995 … in 1990. And then it wasn't that long ago we had Burnt Church. It was a long way from BC, back in New Brunswick, Nova Scotia where those incidents took place. They resulted from the two, so-called "Marshall decisions" around lobster fishing and the like ... That was caused by a Supreme Court of Canada decision … that was just very ill-defined, very short sighted, in the way that they worded it, and it caused chaos in the short run and a lot of really brutal conflict between the people there.

Then, of course, in December 2012 and 2013 a new thing emerged and that was the **Idle No More movement** and it's not going anywhere. As they say in their material, it is *"a grass roots movement"* and

"clearly no political organization speaks for Idle No More." That's a reality, and it's a very challenging reality. Because when you have a political organization that has no political master, when you have a protest organization that is disorganized by design – but that is very well-connected, that can communicate through social media … that can organize events, as we saw with the Wall Street protests as well – it's a new type of protest that were not used to in Canada. These are spontaneous protests that engage an awful lot of people on the streets – people who have no direct stake, but [are] directly affected by what they read and see in their social media and elsewhere.

And in addition to that we have, of course, the **Save The Fraser Declaration**, which is signed now by over 130 First Nations. There are just over 200 First Nations or bands in British Columbia and 130 of those have signed onto the Save the Fraser Declaration. That declaration not only swears off the Northern Gateway Pipeline from getting built, but [also] … any heavy oil project … that crosses the Fraser. And I don't think they will stop at that, quite honestly, when it comes to the Fraser. Because there are many other major river systems that flow into the Fraser, the Thompson and the Columbia.

We've looked at that and said, "Well, as a Province, I am sure it is just because the initial signatories were largely … the bands or First Nations who were not in the treaty process, and many of them, traditionally, have been activists in their comments." But it is not just those First Nations, as important as they are, which tend to be in the Southern Interior and down the Highway 97 corridor, to some degree. It's a whole bunch of others as well. And believe me, when something like this happens, it garners *global* attention. If you think the incidents about Rob Ford are something for Canada, imagine what it would be like if the type of activism that we saw in 1990 – triggered by a number of decisions across the country, especially in Alberta and BC – all converged. Don't underestimate that – because you know what? – historically, as much as I hate to say it and admit it, militancy has proven to be an effective strategy. Often, not just for First Nations, it has proven to be effective for environmental protests as well.

Look at Clayoquot Sound. Do you think the government would have moved if there wasn't 20,000 people on the steps of the legislature; or if there hadn't been the protests in the woods that there were, and all the arrests? They call it "civil disobedience", but it becomes a lot worse than civil disobedience and "legitimate democratic protests" when you see people carrying guns and people and their livelihoods being threatened …

This is what we have to understand about Aboriginal rights and title. They [First Nations] believe that it is not just something that is, for the most part, exterior to their interests. They care about because it affects society broadly, like a lot of us do … They believe it affects where they live, what they do and what they are about as people – their culture and their rights. And they believe that they have legal claims to those rights and title that haven't been addressed and they will get very passionate about it. [There is] a new generation of Aboriginal leadership. It changes all the time. That's in flux as well. The political organizations of Aboriginal organizations are going to be very important as *they* develop. And how we handle these big resource projects and the social license we can or can't earn will shape who gets elected to those councils and who controls them.

[Slide 20: The Eyford Report] That takes us to **Doug Eyford**, who was appointed by Prime Minister Harper in March of 2013 and reported out late last fall. He was sent to engage with First Nations as the special representative reporting directly to the Prime Minster about what would it take to understand their concerns and their interests, to gain more social license among First Nations, particularly Aboriginal people around energy projects. He came up with a report that is very good and is not that long, only 46 pages. You should read it.

The three themes that he settled on, and most of the recommendations, actually, in the report, are what I call – and I don't mean this disparagingly, I think they are very important recommendations – but I've read them *so many times*. They are predictable, boilerplate and just common sense, in many cases. They speak to issues that I can go back 20, 30, 40 years and say, the same thing was said then. The same thing was said again and again. And over and over again, *we* say, "Yeah, yeah, it's really important." Kind of like gun control in the States. And we do nothing about it. Well, I shouldn't say we've done nothing; but we haven't done enough.

So [Eyford] laid out a number of recommendations in his report. He talks about **Building Trust** by establishing *constructive dialogue*. That's just common sense, but it is really important. You know, there isn't a lot of opportunity or forums for ongoing regular dialogue between the different levels of government and First Nations. It just doesn't happen. They do it on a project basis that involves different individuals and different actors. So he is talking about setting up more dialogue that is predictable and consistent. Same thing in commitments to *environmental sustainability*. That's all common sense stuff around preventing spills and being better prepared for cleanups and all that – all the same issues that the Government of BC has been rightly focused on. And also, by enhancing *understanding* – another key theme – and *participation* in pipeline and marine safety. He kind of hints at the fact that the short-circuited processes, as I call it, haven't been too healthy. But the Government of BC and the Government of Alberta are now both talking about building literacy and more awareness, and that really needs to happen. It's not just propaganda, it's public education.

Fostering inclusion. [Eyford] … focuses a lot on **employment and training**, a really important challenge that we have and an opportunity as well. The First Nation population is the youngest population we have in BC and it's growing, which is rare. So the opportunity to provide training to young people in really high-paying jobs, where they live, is really important. But it takes time, it takes special skills, it takes academic credentials in many cases and specialized knowledge. And it is not just going to happen by companies alone coming in at the eleventh hour, as well-meaning as they are, like Enbridge or others. It has to happen on a consistent, systematic basis.

I think the governments of BC and Alberta are realizing that. They are working together as I said on trying to develop those training programs and they are working with industry. Particularly around LNG, the Government of BC is trying to do a good job. But I can also tell you this: nobody has a crystal ball. And when everybody talks about why the government didn't do this, or why industry didn't do that with training, it is because *nobody* had that crystal ball.

If I had a dime for every company that ever came to us in government and said, "you need to be training more workers" and if we had done that using your tax dollars, you'd be the first ones upset about it; because in fact, *those* jobs never materialized and in some cases, they disappeared altogether. You know, you have got to have faith, to some degree in the institutions like Trinity Western others, in planning the curriculum and course content that will actually prepare people. There has to be more focus on it, but government does not have a crystal ball. Same thing with mining. We talk about preparing for the so-called "longwall miners" and the challenges that we had with Chinese temporary workers coming in [up North, at HD Mining's Murray River project]. I don't agree with the program, the way that it was implemented, but I can tell you, the skills shortage that was addressed was *real* as well.

Nobody's had that crystal ball … think about coal and copper and how that has changed in the last decade. It has gone from almost nowhere in the late '90s to just this burgeoning industry, predicated on growth in China that kind of comes and goes with what they are doing – building stuff with steel or building stuff that require our minerals. Nobody has that crystal ball, so it is important for business organizations, economists and academics to do a way better job of trying to envision the future and being realistic about what we need. A great labour pool could be Aboriginal people and that is what Eyford is trying to signal as well.

[Slide 21: The Eyford Report] Advancing reconciliation, that's a big, big theme he talks quite a bit about. He's basically talking about building effective relationships and there is a big difference between just having people on the ground and building relationships that build trust. You need to have consistent representation on the ground, and not just knowledgeable people, but people that act honorably and people that are trustworthy, [who] have consistent direction from government. Governments can't keep changing their minds every five seconds, giving their negotiators new rules or marching orders, and then expect the people on the other end of that to have any faith or confidence in them. It doesn't build relationships. Yet that is what we see too often, on top of the revolving musical chairs that we have, just with our elected political leaders. That is happening more and more, especially in local government. There is no consistency of representation, and that is really important. And [Eyford also talks about] … encouraging Aboriginal communities to resolve shared territory issues. This issue of overlapping claims is a big problem, but not enough has been done. Aboriginal organizations have known about this for over 30 years, but very little progress has been made; and again, he is making recommendations that have been made for the last 30 years at least.

[Slide 22 – The Eyford Report (taking action)**]** I find two of these major recommendations really interesting; one is to *"**develop a federal framework** and timelines for Crown engagement with Aboriginal groups to be applied in a consistent manner throughout departments and agencies."* The federal government has what they call a "whole of government approach", which was just put in place about two or three years ago. They are trying to get all of government together on the same page, so that they all deal consistently across all federal departments and agencies.

[Eyford's saying,] … they've got to go further than that … [federal decision-makers] have to do much more around early engagement with First Nations, acting as soon as they know [about projects under consideration or about decisions that may impact Aboriginal people, rights and title.] They've also got to

"define and articulate [government's] view about the Crown's and industry's respective roles and responsibilities with respect to the duty to consult." They haven't really done that. They have laid a lot of responsibility on project proponents, but really haven't formalized and codified it in a consistent way. And if that is good for the federal government [to do] … the same thing is needed on a national basis.

[For major projects, Eyford suggests, Canada should also] … *"engage and conduct consultations in addition to those in regulatory processes, as may be required, to address the issues and facilitate resolutions in exceptional circumstances."* … the idea of handing over the responsibility for consultation to companies or to the regulators – as we've seen with these joint review panels and the like – First Nations argue, is not good enough. It is the Crown's duty to do that. And Eyford is agreeing with that, in some respects, saying that there are really good important reasons why only [the Crown] can do that, such as with overlapping claims; or where industry and First Nations just don't see eye-to-eye and they can't get an agreement, or for other strategic reasons the government should just be doing that directly.

[Slide 23 – The Eyford Report: Overlapping Claims:] [Eyford further says] that *"In areas impacted by major projects, where territorial overlap disputes do exist, Canada should undertake strength of claim assessments … to advise on the required level of consultation and apportionment of benefits."* Why that is really important is because the courts have said the duty to consult and accommodate First Nations' rights and title is relational to their claims for rights and title, which in turn, is relational to their strength of claim.

… If I say I have an interest in something, but I really don't, because it's hundreds of miles away and [our particular First Nation] might have used that territory very little and it was maybe part of an area that sometimes we went hunting, or whatever – it wouldn't be nearly the same thing, obviously, as something that directly affects an area that is close to where we live, work and we can show that historically we have occupied those lands and used them. And those strength of claims will determine whether or not there are Aboriginal rights, at the end of the day, when you go to court and you have to argue what is it predicated upon? How legitimate is your claim?

Governments have a lot of information about that. The BC Government does, the federal government does. They have an awful lot of information about strength of claims assessments that they've done, but they have given no direction to companies around that. And actually, they haven't shared very much of that information [with anyone], because they don't want First Nations that feel they have a good claim, to be able to argue that the government [also] thinks that they have a good claim. I think that's ridiculous. It's time that we actually grew up as a country and said we are going to have to settle these claims and title issues and we're going to be able to tell you more precisely where we think you're right and also where we think you are wrong, based on the evidence we have been able to glean.

[Eyford goes on to say that] … we should put in place *"a federal policy framework and guidelines to address shared territory disputes in the context of major developments in a consistent manner across all federal departments and agencies."* We don't have that either. Where there are overlaps and shared claims, companies go in there and they are saying, "we have to go and consult and accommodate all these First Nations as if they are all exactly equal."

If a pipeline goes through areas that are circled as claims areas, for example, in the BC Treaty process, [the companies] don't distinguish between them. It's not their job to actually try and figure out who's got a better claim than the next band and it is also not their job to resolve those overlaps. So they just go and try to make deals with all the First Nations as though they are all the same and as though it impacts them all the same, when it doesn't. First Nations have an obligation to settle those overlaps and to put some process in place that actually acts on the commitments they made years ago, that *they* have been unable to politically resolve as well. Eyford is saying that the federal government has an obligation to put some rules in place around this, some codified guidelines that the government has to follow that it can offer to proponents as well.

[Slide 24: The Eyford Report: Will It Change Anything?] Well, to tell you the truth, I have read so many government reports – Nick I know you did, when you were there – all the reports that you get, they're piles of work, tonnes of energy, lots of time and money and cost and commitment and all that go into them; and then they sit and they gather dust on the shelf. This is a report to the Prime Minister, but I think back to the **Royal Commission on Aboriginal Peoples**. It wasn't that long ago, in 1996. [That report was] 4,000 pages, or roughly one-fourth of a single application for a single pipeline today! Some 440 recommendations … there was a lot of really good information in that five-volume report … an awful lot of good information that is still relevant. It set out a 20-year agenda for transformative change. Sixteen years ago the federal government responded to those recommendations and that was that. Nothing has happened on those recommendations of any consequence since that time. Some major changes were made initially, but not since that time have responses been made to that Royal Commission. Governments don't like Royal Commissions. They go on and on, and they [often] achieve nothing they should. *That* was a very good body of work that had a lot of good information. A lot has changed, but a lot more hasn't.

[Slide 25: The BC Treaty Process] The **BC Treaty Process** is a good example of a vision that really hasn't gone the way that it was envisioned. In 1990, when Nick was still there in government, the Vander Zalm Government did a complete 180 on the way that all governments before it had treated aboriginal issues. That was in the wake of Oka and all those blockades that I was talking about and all the other unrest that was going on; and a growing body of legal evidence that the old way was not legally acceptable any longer. So [the government] put something in place called the **BC Claims Task Force**, comprised of government members and First Nations leaders. It reported out in 1991 and came up with the model for the current BC Treaty Process, the six-stage treaty process. They imagined in that report that there would be 30 First Nations in total [in the treaty process]. They said, "well you know, Canada, you are only negotiating with one or two First Nations right now – they called them bands at a time – and there might be a lot on the table, but let's not put any limits on this, we can handle this. If there are up to 30, we'll have to just resource that. We can do this." That's what they imagined and no wonder. ...There are over 200 Indian Act Bands in BC. … I think there was something like 29 Tribal Councils; correct me if I'm wrong on that. They were seeing the idea of "First Nations" in 1990 – including the First Nations involved in the Claims Task Force – as more amalgams of bands that had relationships with each other based on language groups, tribal affiliations and the hereditary Chief system and the like, and they didn't think it would result in that many.

Well, of the 200-plus **Indian Act bands**, 166 have fewer than 500 people who live on the reserve. This is another thing that many British Columbians aren't aware of, that most First Nations individuals, a slight majority even, live off-reserve [62% in BC, 2006 Census]. Many of them live in the cities. Aboriginal people, I think, constitute about five per cent of our population in British Columbia. By and large, they are living as much off-reserve as on-reserve. They are living in small groups that are called now and are in their minds "First Nations", self-defined, with groups of 500 people or less. It's very tough to put together a government and to have the *capacity* to deal with all the applications that are before you and all of the skills help that you need, in order to sort through all of the things that are being put on your desk, if you are band council member or administrator. It's just unbelievable, actually, to think that they would be able to do that without more support and without bigger groupings that, often, have very disparate interests.

Sixty First Nations are now part of the BC Treaty process … that's about double the number that were anticipated. That includes 104 *Indian Act* bands, so about half of all the *Indian Act* bands in BC are in the treaty process. But 20 of those 60 who signed-on are not currently negotiating, so that leaves 40. And of the 40, only two – or arguably more than that, if you break it down – but two treaties have been signed. Two First Nations have come to treaties in 22 years, with hundreds of millions, or arguably, billions of dollars spent in negotiations. Three Final Agreements are awaiting ratification right now. That's the last stage … so they are waiting on their band members to vote on them, but they haven't done that yet. Five Final Agreements are in negotiation, so that means they are very close to getting an agreement they could put to their people, and 30 First Nations are negotiating Agreements-in-Principle. Ten of those 30 are in advanced Agreement-in-Principle negotiations. Basically, they're still talking, they are still disagreeing over a whole lot of stuff, they are kind of carrying on and on – and maybe 22 years from now we will have another two, four, or six treaties to celebrate, and a lot of mountains of debt that the First Nations are incurring. And that debt is, in many cases, actually much greater than what they can even expect to gain in monetary rewards through the cash settlement component of treaties.

Then we've got the **BC Treaty process** itself. This is from Chief Commissioner, Sophie Pierre's … latest report. Go back the last three, four, five years – report after report – it's a damning indictment of the process, essentially saying that there is a lack of government funding and commitment; there's the overlapping claim disputes, which they point out, First Nations haven't been able to resolve; ongoing mandate challenges – the feds can't get their mandates straight and refused to entertain changes as the BC Government has actually made; tonnes of delays and debt they are accruing. There's been a shift in focus, especially in the last two [or] three years, particularly under the Clark government, away from comprehensive treaties to "short-term economic agreements" … [to] revenue sharing agreements and the like, which are really about getting to "green light" on resource projects. First Nations are happy to engage for the most part in those kinds of discussions, because those aren't constitutionally entrenched, but they don't get to the end *vision*.

And revolving commission members – I think she mentions in her current annual report that there is only one person [among the Principals] on the commission that is the same as before [i.e. last year]. So you are always dealing with new commission members. And she points out, I just found this quote

stunning, that they haven't even *met* since May of 2012. They are supposedly commissioners who are supposed to be meeting, but there isn't a lot to meet about, apparently.

[Slide 26: Reconciliation] The goal of the treaty making process is largely, as Eyford talks about – and this is also the central thing that all the court action has been leveraged towards – is *the reconciliation of the preexistence of Aboriginal societies with the sovereignty of the Crown* … What they mean by that is, reconciling Aboriginal rights, title, customs, traditions and all that existed before [and with] the assertion of European sovereignty. That's what it is all geared towards, is reconciling that, and it's not very easy to do.

The [Supreme Court of Canada] has said … *"The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief"* – that means temporarily stopping a project against the threatening activity – *"to damages"* – meaning costs to companies or to the Crown – *"to an order to carry out the consultation prior to further proceeding with proposed government conduct."* So those are some pretty severe penalties that can be applied for a failure to properly consult and accommodate in the goal of working towards reconciliation.

[Slide 27: Towards a New Relationship] I don't mean to minimize the progress that's been made. There's been tonnes of progress ... I won't recite all of these, but there are all sorts of new agreements in place, there is revenue sharing, there are deep commitments to a new relationship that began particularly in 2005, with the Kelowna Accord – which the Harper government didn't want to fund and didn't feel was funded by the Martin Government. In BC, we also have the Transformative Change Accord, which embodies the same things. It was about closing the socioeconomic gaps, in health, education, housing, and economic opportunities, within a 10-year period. It was a very laudable initiative, from the First Nations' perspective. They were very happy with the commitments that were made. But words are cheap and the actions really haven't been borne out by either side over time, and there has been a lack of political will.

So there has been lots of progress for First Nations, no doubt. Self-government is a reality now in a way that it wasn't at all in the 1990s. It's *real*. First Nations run their own child protection services, largely; they run their own adoptions, largely; they have their own significant say over health and education that they didn't previously have – and that's all good. What hasn't changed is the argument around title. In fact, there hasn't been a successful **Aboriginal title claim** saying that "you own your land."

[Slide 28: Williams vs. BC] … I want to draw your attention to [this case], because it's really important and it is going to be a huge issue. It has been before the Supreme Court of Canada and is waiting for a judgment in the next six months. It involves Chief Williams, who I mentioned around the Prosperity Mine, on behalf of the Nemiah Valley Indian Band and the Tsilhqot'in Nation more generally or broadly. It relates to a dispute that goes back a decade and basically what it is about is, what is the nature of Aboriginal title?

[Slide 29 & 30: Williams vs. BC] What Justice Vickers [ruled] in the B.C. Supreme Court and was [partially] rejected by the BC Court of Appeal is now before the Supreme Court of Canada … it is about a so called "territorial theory" of Aboriginal title, which was very different from what has been argued

before. The idea before was that, to prove that you had Aboriginal title, it was really a very fact- and site-specific [conception], [demonstrating] exclusive use and occupation of the land that was very limited. That would be enough to prove that you had title, because title is about absolute ownership of the land. What Justice Vickers [said] in this case was that if the First Nation had argued under a territorial theory of Aboriginal title they could've perhaps proven they had title to six huge tracks of land that are still now before the courts. And that [theory] really has to do with a lot of hunting activities and nomadic activities and the like, where you are using land on a less exclusive basis.

[Slide 31: The Stakes Are Huge] If this title case is resolved in favor of the appellants [i.e. the First Nation] I think you're going to find it has a huge influence on resource development in BC. It will affect [land] titles all across the pipeline routes and for virtually all of BC resource development. It could trigger massive compensation costs for unjustified infringements, possibly long after the pipelines are built. And it will be taxpayers who will be on the hook for that. And it could render many federal and provincial laws unconstitutional. In [the Williams] case, the *Forest Act* was deemed to be inapplicable, unconstitutional to some of the lands that the First Nation had disputed. That would, of course, trigger endless litigation for unjustified infringements.

[Slide 32: The Ground Rules Are Changing] Dave Porter is the CEO of the First Nations Energy and Mining Council. That quote is indicative of the mindset right now across North America that [for many First Nations, the goal of reconciliation] *"means more than jobs and contracts, it means getting ownership.*" And Enbridge has set the floor, not the ceiling around that.

[Slide 33: Beyond the Eyford Report] The themes he touched on were really good, but I think we need to **think more globally**. There is a contradiction between the speed that we want projects approved by now – faster than ever, because we have to compete with countries like Australia that are developing LNG – and the extra time that it actually takes to build social license. We have to start thinking more about the brand impacts [on companies and on jurisdictions] that that's going to have. If Canada gets a bad rep, like we saw with the proposed European fuel quality directive around heavy oil, it can give Canada a bad name. The forest industry learned that the hard way. Companies in the energy industry are just up against that now. We have to be much more aware of global best practices and we have to have a national debate around [the challenges of] state-owned companies and foreign investment and ownership. I think Harper tried to do that, to some degree. The degree and the amount of investment from state-owned companies and foreign nationals in Canada's resource sector is staggering. It is also arguably needed. But if it amounts to *control*, I think, you're going to have an awful lot of Canadians very upset.

Similarly, with the **scope and benefit of partnerships** [with First Nations]. I don't think we are even remotely close to where we need to be with the amount that companies have put on the table or that governments have put on the table, for revenue sharing and things like that. Because First Nations have legal rights that they're going to win in court. And it is going to cost us much more to resolve later than up front.

Communication and benefits: everybody talks about that. This is another big thing, I think, for shareholders and companies. They don't like to spend a lot of energy on it because it doesn't seem to pay off for shareholders, who are wondering why the [corporate executives] are spending their money, cutting into their dividends, communicating and doing advertising, things like that. They have to become way more savvy about the fact that, if they don't communicate, they are not going to get their projects approved, they won't stay in business and they won't grow and be profitable. Companies and governments have to do that, too, and media partnerships are part of that. Post Media is doing that quite a bit right now … it's just not very well advertised. There is a partnership, in fact, between the media and the resource companies that should be clear is not "news." It's a partnership that is as much as anything, aimed at selling advertising and resource development.

[Slide 34: Beyond the Eyford Report] We also need a new federalism, embracing First Nations as real partners at the table with First Ministers. We haven't really committed to that. We've had fits and starts of that and we need to get back to that. We need to elevate the accountability of First Nations' political leadership structures. We had something called a First Nations Leadership Council that tried to speak for a bunch of First Nations in BC and that really didn't have an awful lot of clout with its own members. It had no real authority or mandate to speak for its members. So that's a big problem. Who do you talk to? We do need that National Energy Plan, not just for the Premiers, but also for the federal government. And that should involve Aboriginal participation as well in planning that. It should not be imposed on them or handed to them as a fait accompli by premiers.

Cumulative effects. Eyford talked about this. It's really important, because only governments can talk about and plan for cumulative environmental, social and economic effects. It's also really important because when you are arguing Aboriginal land claims in courts, and rights and title, the courts have said it's important to consult and to consider the **cumulative effects** evidence as "contextual evidence" in deciding the duty to consult and the strength of claim that I talked about earlier. We haven't done that well and I mentioned that baseline science had been shortchanged.

[Slide 35: The Sham of False "Consultation"] I thought this quote from Justice Griffin just recently in the BC Teacher's Federation decision was really instructive. She said, *"A party cannot say it is consulting if it starts from the position that its mind is made up no matter what the other side presents by way of evidence or concerns."* Well, that might equally apply to resource development. The truth of the matter is that when companies start a resource project, they are not in it to hear that it shouldn't be built, or that it can't be built. They might talk about how to mitigate concerns or make it different. Same with government, when governments effectively say, "this is going to happen"; and same with Aboriginal organizations and environmentalists: if they start with their minds made up, you are at a stalemate and no amount of consultation is going to solve that. You need protocols and rules there to deal with that eventuality, where parties are just not prepared to negotiate and they are really not prepared to compromise or accommodate each other. I think that means not just taking a "whole of government" approach federally, but rather a *"whole of Crown"* approach nationally.

[Slide 36: Consultation & Engagement] The BC Government, the Alberta Government and the Government of Canada should *all* be on the same page, with the same rules and the same characters,

developing *relationships* through *honourable action, over time*. And that means developing a national framework for **consultation** on the expectations, protocols, timelines and requirements for consulting, including the terms of reference of Joint Review Panels. We didn't do that in Canada [for Northern Gateway or other projects] and I think that has been a mistake that will come back to bite the government.

And the *Crown* has to own the duty to consult, because you can't separate Aboriginal rights and title from the projects. It's true, proponents can do a lot of consultation and they can do a lot of accommodating to mitigate concerns and the like, but they can't deal with [legal] claims around rights and title. And you can't blame First Nations for saying, "I don't want to talk to you, because you can't talk about rights and title and that's what my interest is here. You're going to put a pipeline through *my* land." … Where they think they might have a claim to rights and title, that's a big deal and governments have to recognize that. They can't short-circuit that process or hand it off to [anyone].

Also, we need a national regime for funding consultation and accommodation. This one, I think, is a really important idea. Alberta's got a *Consultation Levy Act*, where they actually charge and can charge resource companies for the cost of consulting. And I think, with the amount of money at stake, the amount of money that should be at stake in this, it is a small price to pay to make sure that it's done properly and that it would go a long way to also equalizing the scales for the smaller companies.

[Slide 37: Transparency & Regulatory Reform] That is another big issue. The mining industry is just handing in its recommendations around the Feds' commitment to a new mandatory reporting system to the security regulators for when companies are dealing with governments around the world. That should also include Aboriginal governments and it doesn't. The recommendations don't and they should. We should actually have more independent auditing of Aboriginal expenses, annual reporting of government programs and government expenditures on Aboriginal programs and services. I'm not talking about the Aboriginal bodies, and I'm talking about how much *we* spend. In British Columbia, I think we spend about $2 billion a year on Aboriginal programs. We don't know what we spend, really, in Canada and we should. Taxpayers should have a better sense of that.

[Slide 38: Liability For Unlawful Infringements] Finally, we should have new rules around **liability** and considering liability and the cost of liability for unlawful infringements. Because as I said, if the government fails in its duty, if the Crown fails in its duty to consult and accommodate, it is going to have to pay compensation. This could be in the hundreds of millions, or billions of dollars in the future for title claims. It should be up to government *now* to start wrapping its mind around how to pay for that. And that requires some form of fund being set up. It requires *industry* liability insurance, I believe, of some kind, just like they have for spills, where they pay into that collectively. Maybe that could be part of the consultation levy, I'm not sure. It's the idea of thinking about, how do you pay for massively expensive claims? Because they will hit in one fiscal year and governments won't be able to afford them, as we've just seen with the BC Teacher's Federation.

When government makes a bad policy decision that the courts rule was unconstitutional – and then decide to roll back the clock and say "you're on the hook for the whole cost of that" – the reason why

[the Clark government] is appealing, among other reasons, is because it can't afford to pay right now. That decision might cost a billion dollars and they don't have that in the bank. That would break their budget and they wouldn't balance it. We need to think about that in regard to Aboriginal liability as well, for rights and titles that are infringed.

[Slide 39: It's All Possible] My last slide is just to show a picture of that guy – I think he is from Portugal – from the other day, surfing that 70-odd foot wave. I was thinking, that's kind of what it feels like sometimes when you're in government and you're dealing with these issues! It's not impossible to ride it through – it just feels like you're going to get killed! – but you can surprise yourself. The main thing is, you have to get up and at it and you've got to keep your head about what you are doing. In this whole area there is an awful lot of room for growth and progress and I kind of hope that the Eyford Report provokes more debate than it has.

Thanks for everything.

Questions & Answers:

1.

Question:

I'm intrigued by your idea establishing a new federalism and particularly the recommendation of a third order of government and I was just hoping to pick your brain about what model that would form and how you would adequately represent that diversity of the aboriginal populations and how that would affect jurisdictional divisions that ____ states as fiduciary duties?

Response:

I don't think it would affect the Crown's fiduciary obligations in terms of consulting. But it would give Aboriginal people more representation in our parliamentary procedures, build better understanding and build relationships with decision makers. I used to be against that idea [of prescribed Aboriginal representation in Parliament]. I used to be dead against it. I am for that idea now, actually, because I just think it's time. I think the Royal Commission suggested it. It was anticipated, frankly, with the Charlottetown Accord and other discussions that have been had. But the place to start is to bring people to the table and that's what we found, in 2005. You can just get so much further when you start talking and listening to each other.

So your question is really pertinent. How do you pick the right Aboriginal leaders to be at the table to even talk about what to do? They do have political organizations, and that's where you start, you get those people together. And I think a series of ongoing consultations should be formalized, every year. There should be time set out in the agenda for First Ministers and others to talk to First Nations. There should be formal, structured bodies where this stuff happens and where ideas get put forward. And we shouldn't be afraid to discuss it. Right now, I find it sad, because anything that involves that idea,

doesn't necessarily involve constitutional reform, depending on what they do. But certainly, if it was involving the makeup of the Senate, or the House of Commons, or whatever, you are just not going to get anywhere with the current climate that we have. And that's a shame.

2.

Question:

I see a bit of a parallel in the negotiation of a Constitution and the creation of something like the pipeline. Just thinking of the way that, for example, executive federalism was rejected in the early 1990s for a model that then insisted that, for example, there was to be wider consultation and think that the argument that wider consultation needs to be done will become ad nauseam and involve wider and wider groups of people. In the end it made it possible, for example, in Meech Lake for one person to navigate forward. Is it possible that an Elijah Harper could come along and stop it?

Response:

Well of course, it can take one person and I think one tragic accident, or a significant number of protests, as I have talked about. I think it's going to happen. Sadly, I think we are going to have decisions that come down that will provoke a response that will force the country to reconsider what it has been doing. This happens every 10 or 20 years it seems like, in Canada. The idea that you're afraid to consult because you won't like what you're going to hear, or you think that you can't possibly get all Canadians onside, so it's better not to raise the question and just let people decide behind closed doors. It's wrong. The world isn't the same. And that's what I'm really trying to stress here. It's not a way of going forward any longer.

It might have been the way to do it in the past – we do elect decision makers to decide for us, so we can always throw those people out if we decide we don't like what they do – but we first of all have to have a *debate* about the issues and we don't do that. Right now we're afraid – this whole issue of Aboriginal rights and title has been so taboo for so long in the country and that's the real truth. It's that Aboriginal leaders talk about it an awful lot, but they haven't been able to engage – people get real interested all of a sudden when there's something on the six o'clock news that catches their eye. This kind of stuff, constitutional conferences, doesn't catch their eye. But I think the place to start is through dialogue. The treaty process should teach us something as well. You can talk ad nauseam if you don't have a mandate, if you don't have clarity and if you don't make a decision. There has to be finality to this process by *somebody* making a decision, even if it forces a court case, even if it forces litigation, or even if it provokes a response you don't like. I think that is actually how you get discussion started – it is by properly engaging and then *deciding.* And we have to be more prepared to do that, politically.

3.

Question:

Most of Canada outside of BC went through a due process, why did BC come into this so late and is still in the sense as you just pointed out totally unresolved.

Response:

Well the fundamental reason was, well it was settled at a different time for starters, as developments happened across the country and the Crown and companies engaged with First Nations across the country. We got settled later, but because we didn't have any treaties until after Nisga'a and after the Nisga'a challenge in the '70s, that's when everything got flipped on its head. Then, of course, the Charter of Rights has changed everything, because the opportunity for negotiating treaties is informed by *rights*. All that has changed. We use to sign treaties that exhaustively signed-off Aboriginal rights and title. They had to *surrender* any of their rights that were not put in the treaty. The Charter changed all that. You can't demand surrender [of undefined rights or title] and First Nations would be crazy to surrender [them] now. So there's more impetuous for negotiating resolutions, especially with court challenges every year coming out, saying you don't have to settle for that.

…the sale of fish, for example. We just had the case with the Nuu-chah-nulth-aht, where the courts upheld they have a right to commercially sell fish. That was not accepted by the courts in the past. In fact, I would have sworn up and down 20 years ago, 15 years ago, 10 years ago, they had a right for food and ceremonial purposes, but they couldn't *sell* it [fish]. So every case like that, that says what's a right, what's the duty to consult and accommodate, what's the standard for title, as I'm trying to talk about tonight – it just prolongs [First Nations' treaty negotiations], because basically their members say, "why would we settle?" And I think that's the real, real reason [for the lack of treaty progress] – it's that the courts have changed all that and have done [negotiations] no favours. The more we put in policy and in legislation, the more you may leave yourself open to more challenges; but you also create and leave yourself open to more *clarity*, because you put a *standard* before the courts that they have to rule on and either say, it works or it doesn't. We haven't done that much. We mostly say [to the courts], "well you decide" and Aboriginal communities are *right* to wait, politically.

4.

Question:

Some people would say that something like, well anything to do with race-based government is incompatible with the modern liberal democracy but clearly the divisions in Canada are those lines going to go away time soon. So would you say that this third order of government is just the best way of dealing with that reality?

Response:

Well they *are* a third order of government. The courts have recognized the inherent right to government and governments have directly and implicitly recognized that with their policies as well. So to pretend that they're not is crazy now, in my mind. They are not a delegated order of government, like I used to argue they were, when I used to think that's what the courts were saying at the time. They are not. The law says they're not any longer and that they have rights that many people didn't believe were there. I talked about [on Slide 37] ending the "Third Solitude." They are not just "anybody" and we can't look at that as "race-based" government because it's "Aboriginal" – it's not.

They are indigenous *peoples*, plural. The reason they have special rights and title is because they were here *first*. They are *founding partners* who were never recognized as partners in our Constitution, who were vaguely recognized in 1982. But even as late as Meech Lake, when we were talking about a "distinct society" this and a "distinct society" that – and that's what people wanted to get all up in arms about, with just that dynamic – the "third solitude" is still aboriginal peoples, who the courts have said have the inherent right to self-government. That's what makes them different, and somehow, we have to start really talking to them, politically, through our elected leaders, and holding them accountable as well, politically, through their elected leaders. And that's not happening either. There is just no dialogue or accountability on either side and I think that's what's changing, in my mind.

5.

Question:

Fear is not an option. How can Gateway and [Trans Mountain?], which was so hopeful, ever happen?

Response:

I'm not particularly hopeful for either one of them, to tell you the truth. I think both *will* be approved by the federal government and that both will be challenged. And I think that Northern Gateway – you've got to hand it to Enbridge; for them, fear certainly has not been an option in that they've certainly been willing to put themselves on the line. But I don't think they have a clue, really, about what's coming when the project is approved by the federal government and when they are the poster child for Indigenous action, if that comes, in the world.

And it's happening right here, in Canada. Like, this is *Canada*! We have a global reputation as being a country that can always get along, can always solve our problems and that listens and respects each other and all that. That company's *brand* is going to be on the line and its shareholders have to be aware of that as well. I hope they know what they're doing. Certainly they have done a better job of communicating lately. But I think it will get approved and that Trans Mountain will probably also get approved in due time, too. And I think both [projects] will be stopped dead in their tracks for some time, legally, by the courts through Aboriginal claims, if not through direct political action.

6.

Question:

[Apologies, this question was not able to be heard.]

Response:

No and I think that has been an epiphany for me. (How can you have an epiphany over 20 years?!) But it has been a growing awareness, you could say, for me. When you read judgment after judgment after judgment, they talk about this – Aboriginal rights and title are not fixed in stone. The way that you practice rights and title – as what's happened with this right to sell fish – is that they have to be, in the

courts' eyes, translated into a *modern context*. And the culture changes as a result of that. The bands living in houses near the Jackpine Mine [in Alberta], for example, have houses and community centres and things like that, that oilsands companies are paying for, and that has transformed those communities into more modern, connected communities and all that. And that has changed their culture and life. But it doesn't change at all their [legal] ability to practice their [treaty] *rights* in a modern context. And I guess some of it is just this: where do you draw the line, when "rights" disappear altogether – and that's a big point for First Nations. If you can't fish, arguably, or you can't hunt, because the game is gone, or because the ecosystem has been so severely disrupted that your rights are diminished or gone altogether, then obviously, that right is *gone* and you can't even practice it in a modern context.

Question 7:

(unable to be heard)

Response:

Traditional title is one form, title is a form of a right, but Aboriginal rights are much broader than that. That's why the courts are so persuaded by traditional knowledge and through oral cultures and oral traditions and the like, which many people look at and say, "well that's not our *European* model of evidence in the courts" and the like. You just have to recognize that, if you never had that [custom, practice, tradition, etc.] written down, then that's the way you practiced it; and that's the way that you recorded it, it was *orally*, and orally means that that tradition carries on as well. [Aboriginal groups] have been a lot more careful themselves about documenting things [in recent history].

Every form of Aboriginal right, right now, has to be looked at in a modern context. And that's why things like adoption services and child protection and other things are very tough issues, because they too have to be translated into a modern context. And it is a real challenge, because as governments have been trying to wrap their heads around it, they get blamed as well. They get held accountable for things they do to try to respond to in that dynamic, when they devolve authority. And we've seen that with child protection issues particularly, it's a really tough issue. If the delegated authorities don't do their jobs, then whom do you hold accountable? The reason that's happening is trying to be more sensitive to the rights that Aboriginal people have in the modern context.