PRESENTATION TO THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES

Bill S-6: An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations

Speaking Notes

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February 28th 2012

Check against Delivery

Chairman and committee members, I am speaking here today both in my capacity as the portfolio holder on governance for the Assembly of First Nations (AFN) and as the Regional Chief for British Columbia.

Where First Nations or groups of First Nations lead federal legislative initiatives which are optional for First Nations – which is the case with Bill S-6 - the *First Nations Elections Act,* it is appropriate that the AFN support such initiatives.

We therefore speak to support of Bill S-6 and those First Nations that want to take this step, but do so with a request that an amendment be made to section 3.

Sub-sections 3(1) (b) and (c) permit the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) to "add the name of a First Nation to the schedule" (place a First Nation under the Act) without their consent – this is not appropriate. On February 15, 2012, my friend Minister Duncan testified before this committee that he would never use these powers (unless there was an 'intractable situation'). It is important that these subsections be omitted so as to ensure that none of his successors have the opportunity to use these powers.

First Nations are in a period of transition and moving towards increased autonomy and self-government. Our approach to governance reform – our collective strategy – is to create the foundations of good governance that will support the transition of our Nations from essentially administering federal programs and services on behalf of

Canada or "self-administration" under the *Indian Act* to self-government with appropriate accountability to our citizens.

During last month's Crown – First Nations Gathering much was said about getting rid of the *Indian Act* and the challenges we have had in doing so.

These challenges were expressed using a number of metaphors - the Prime Minister's *Indian Act* tree with deep roots and the National Chief's boulder to be pushed aside. During one of the community dialogue sessions I have been holding in BC on governance – around the development of our BCAFN Governance Toolkit – Chief Geronimo Squinas from Red Bluff First Nation, used a different metaphor. As we were discussing the continuum of governance options that are currently available to First Nations as they move away from the *Indian Act*, Chief Squinas, remarking on the fear that exists in our communities as we move away from the *Indian Act*, likened the *Indian Act* to an inflated balloon. If you take a pin and pop the balloon, it explodes and what are you left with? The *Indian Act* is gone. The question is: what takes its place?

The answer, and the work that we are all engaged in, to continue the metaphor, is to untie the *Indian Act* balloon and slowly let the air out – at a Nation's own pace, based upon their priorities and direction from their citizens – so that eventually all the air is out of the balloon and what replaces it, is self-government.

In letting the air out of the balloon there are a number of options or incremental steps towards governance that can be taken. These are the continuum of governance options. These options are expanding and Bill S-6 is one example of letting the air out slowly with respect to one, albeit foundational and essential, aspect of governance – the selection of the governing body, and in this case the election of a chief and council under a new set of standardized rules.

To date every First Nation that has moved along the continuum of governance and is self-governing has, in fact, eventually taken over full control of its own elections and developed an election code or an election law. The election laws are quite varied. In my region this includes Sechelt, Westbank, Tsawwassen, Nisga'a and the MaaNulth First Nations. In addition, 109 First Nations in British Columbia are under custom election codes, and their elections are not governed under the *Indian Act*.

There are, of course, many ways to design a government. Research and experts tell us the quality of governance, much more than its specific form, has a huge impact on the fortunes of any given society. Ultimately, as all First Nations will be self-governing once again, they will – as part of their self-governing arrangements – adopt election rules. Some will use the rules set out in their existing custom election codes; some may use the Bill S-6 rules; and others will follow different rules altogether. No matter the content, these election rules will be set out either in the Nation's constitution or in an election law made pursuant to their constitution and their inherent authority to govern.

I say this because it is very important for this committee to understand how "stepping stone" legislation, such as Bill S-6, that comes before you and addresses aspects of First Nations' government fits into and supports a vision of moving along the continuum of governance so that once, to use our metaphor, all the air has been removed from the *Indian Act* balloon, we are left with strong and self-determining First Nations.

Unfortunately the power set out in sub-sections 3(1) (b) and (c) of this proposed Bill does not support this view of the continuum and is actually an example of the inappropriate use of federal legislation that I referred to at the Crown - First Nations Gathering. These subsections allow the Minister to force a First Nation to come under the election rules set out in the Act if there is either (1) a protracted leadership dispute, or (2) where the Governor in Council has set aside an *Indian Act* election because there was a corrupt practice. These provisions essentially give the Minister the ability to impose core governance rules on a First Nation which if ever used would be resented by that First Nation, would not be seen as legitimate in the eyes of that Nation, and would probably add fuel to an already burning fire.

If a chief and council so chooses, they can come under the Bill S-6 election rules, or they can choose to develop or change their custom code – either made under the *Indian Act* or under Bill S-6 in the future. Ultimately each Nation must, and will, take responsibility for its own governance (including elections).

At this point one thing I would like to say is that there may be an unintended consequence of the Bill that could lead to political and perhaps legal problems for a First Nation and Canada, is the fact that Bill S-6 makes no distinction between a First Nation that at the time of scheduling follows the *Indian Act* election rules and a First Nation who has enacted, and follows, a custom election code. This could mean that a chief and council, by resolution only, could overturn a community approved custom election code – where a First Nation has developed its own custom election code and its members have legitimized (or voted in favour) of that code. While custom election codes often provide rules that require the code to be amended in the same or similar manner in which it was made it still raises some flags. It might actually be seen as a step back along the governance continuum and empowering community.

No doubt there will be some questions in our communities about whether or not there should be a local referendum to change the election rules, whether under the *Indian Act* or custom, and it would not surprise me if some communities, though not required under Bill S-6, will hold referendums.

Getting back to section 3, and the Minister's ability to "add a name of a First Nation to the schedule" without their consent, it is not just a political problem. If there is one aspect of the inherent right of self-government that I think we can all agree on that must be constitutionally protected under section 35 of the *Constitution Act, 1982*, it must be the ability of our Nations to determine their own method of selecting their leadership. Otherwise section 35 is really

meaningless. If First Nations have this right – the ability to legislate in this matter – we have to ask ourselves if Canada can, however well–intentioned, legislate in this area and potentially infringe the right? So while practically some of our Nations want such legislation – they need it to be a part of the continuum towards the full implementation of self-government.

We must all ensure the chances of successful challenges to the legislation are minimized. First and foremost the legislation must be supported by First Nations as transition legislation that it is not intended to be definitive of the right to govern but rather implementing aspects of the right to govern. Secondly, the legislation must be optional. I believe Bill S-6 meets this test with the exception of subsections 3(1) (b) and (c) which I think may be successfully challenged as an unjustifiable infringement on a Nation's right to govern.

Going back to Chief Squinas' balloon metaphor and taking it one step further – we must make sure that Canada, whether through legislation or policy – is not empowered to refill the *Indian Act* balloon. However well-intentioned and perhaps justified from some peoples' perspective, forcing election rules on a First Nation is an example of Canada re-filling the *Indian Act* balloon and should be avoided.

Part of the reason some First Nations may, in fact, be facing election challenges and facing protracted election disputes is not simply because of deficiencies in the election process, but rather symptomatic of more deep seated governance problems of governing under the

Indian Act. Selecting the governing body – elections – is only one aspect of core governance.

One of the fundamental building blocks of getting past the *Indian Act* and the hurdles we have to overcome is starting with re-building core governance in our Nations. While this includes the rules for how we select our governing bodies (elections), it also encompasses how those governing bodies make laws and consider them, including: determining who are our citizens and their rights and equally as important their responsibilities, accountability from our governing bodies however so constituted back to the citizens, political as well as financial accountability, and some fundamental principles about how our Nations view the world and approach governance taking into account our distinctive cultures and traditions.

For our Nations, answering questions about core governance is part of the decolonizing process. Questions such as: Do we have a chief and council and how do we select them? Who can run for office? – are there conditions – age, residence, clean criminal record etc. – how long are the terms (2 years, 3 or 4 years), are elections staggered or not? Does the chief preside over meetings and what threshold of voting is required for different laws and what laws require a community referendum? Is the number of members of the governing body fixed or does it change? Is there more than one governing body for different functions and what role do the elders play – and the youth?

What, in fact, is missing from our toolbox to move beyond the *Indian Act* is an effective and simple mechanism for a First Nation to remove

its core governance out from under the *Indian Act* when it is ready, willing and able to do so and after its citizens have legitimized governance reform through a community referendum.

Many of our Nations, and particularly those in my region, have at some point looked to develop a community constitution to provide for core governance including selecting the governing body, political and financial accountability, determination of citizenship and other matters fundamental to ensuring strong and appropriate accountable government. However, short of negotiating self-government with Canada or going to court, there is no practical way to implement the Nation's constitution.

So what we need – a fundamental building block – perhaps the first building block for many First Nations – along the continuum towards full self-government is enabling or governance recognition legislation which would recognize that where a First Nation has developed and ratified its own constitution it can remove itself from a substantial portion of the *Indian Act.*

This is, of course, not a new concept to the people around this table as such legislation has been introduced in the Senate before. We look forward to seeing similar legislation introduced in the near future.

In conclusion, for those Nations that want to use them, there is no question that the election rules that have been developed in Bill S-6 and as will be expanded in the regulations are superior and more thought-through than those under the *Indian Act*.

Finally, I want to say how important this governance work that we are collectively undertaking is to our Nations. Our future success depends on it – culturally and economically.

Ultimately our peoples will, once again, be self-determining. Until such time, your role as law-makers in this period of transition is critical. We thank you for helping to ensure that our transition from the *Indian Act* is as smooth as possible and that the process is facilitated with respect and dignity for all involved.

Gilakas'la