



FIRST NATIONS SUMMIT

BACKGROUNDER:

THE FIRST NATIONS PERSPECTIVE ON CLEARING THE PATH TO JUSTICE

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FIRST NATIONS SUMMIT**

To

CLEARING THE PATH TO JUSTICE

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CLEARING THE PATH TO JUSTICE

BACKGROUND – FIRST NATIONS PERSPECTIVE

GRAND CHIEF EDWARD JOHN – FIRST NATIONS SUMMIT

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I. Executive Summary

1. First Nations in BC have long been concerned that even as they appear to make significant strides through the judicial system and in the international arena, they are still a long way from achieving the ability to protect and exercise their inherent rights in a meaningful way. The path to justice is adversarial, expensive, time consuming, and as such, largely inaccessible. The pattern of Crown conduct reflects a tragic history of suppression (e.g. voting rights), criminalization of Indigenous Peoples (e.g. the Potlatch laws), denial of the existence of Indigenous Peoples and the denial of the existence of Aboriginal title and rights until proven in court.
2. Canada has failed to fulfill its human rights obligations and commitments regarding Indigenous peoples. Its ongoing opposition to the *United Nations Declaration on the Rights of Indigenous Peoples* (“*Declaration*”)¹ undermines its position as a Member of the Human Rights Council (“HRC”). Canada and the Province of British Columbia (“BC”) continue to deny the constitutionally-protected title and rights of First Nations in litigation and in modern treaty negotiations. The First Nations Summit (“FNS”) respectfully calls upon Canada and BC to recognize, affirm and respect the rights of First Nations in British Columbia to their lands, territories and resources, and to fulfill its international and domestic legal obligations in this regard.

II. Canada’s opposition to the *United Nations Declaration on the Rights of Indigenous Peoples*

3. The *Declaration* was adopted by the United Nations General Assembly on 13 September 2007. Indigenous Peoples were directly involved in the negotiation and drafting of the *Declaration* and were instrumental in its adoption. The rights affirmed by the *Declaration* constitute the “minimum standards for the survival, dignity and well-being” of the world’s Indigenous peoples.² The *Declaration* does not create “new” rights – rather, it elaborates upon existing international human rights norms and guides their application.
4. Canada was one of only four nations to vote against the adoption of the *Declaration* in the General Assembly. Since the election of the current minority Conservative federal government in 2006, Canada has engaged in deliberate attempts to undermine the value and meaning of this important international human rights instrument. In international fora, Canada has consistently opposed references to the *Declaration*, erroneously claiming that “it has no legal effect in Canada, and its

¹ GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, UN Doc. A/61/49, Vol. III (2008) 15.

² *Ibid.*, art 43.

provisions do not represent customary international law”.³ The Canadian government has also ignored the democratic will of the Canadian House of Commons, which adopted a motion on 8 April 2008 endorsing the *Declaration* and calling on Parliament and the Canadian government to fully implement the standards contained therein.

5. As a member of the HRC, Canada is committed to upholding “the highest standards in the promotion and protection of human rights”.⁴ Canada cannot “pick and choose” which human rights standards apply to it. Canada’s opposition to the *Declaration* violates the rule of law and seriously undermines the important work of the HRC. The FNS calls upon Canada to reverse its position on the *Declaration* or else resign its membership of the HRC.
6. The *Declaration* should be used as a minimum set of standards to guide the interpretation and application of domestic laws. Courts should use international instruments, including declarations, as “relevant and persuasive sources”⁵ in interpreting Canada’s domestic laws. There is “a well established principle of statutory interpretation that legislation will be presumed to conform to international law”.⁶
7. The *Declaration* applies to all UN Member States, even those that voted against its adoption in the General Assembly. In its 2008 Concluding Observations on the United States, the Committee on the Elimination of Racial Discrimination (“CERD”) recommended that the *Declaration* guide the interpretation of the obligations of the United States under the *International Convention on the Elimination of All Forms of Racial Discrimination*⁷ relating to Indigenous peoples, notwithstanding that the United States voted against the adoption of the *Declaration*.⁸ Similarly, the *Declaration* should provide the framework for the assessment, during the Universal Periodic Review process, of Canada’s fulfilment of its obligations regarding the human rights of Indigenous peoples.

III. Denial of the Existence of Aboriginal Title and Rights in British Columbia, Canada

8. Unlike other parts of Canada, Crown authorities signed very few treaties with the First Nations in what is now known as British Columbia. Instead, traditional territories were taken without the consent of First Nations and without compensation. On February 14, 1859, Governor James Douglas unilaterally declared that “all the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee”.⁹

³ UN GAOR, 61st Sess., 107th Plen. Mtg., UN Doc. A/61/PV.107 (2007) 13. See also Canada’s “Statement to the Human Rights Council on the Mandate of the UN Special Rapporteur on the situation of human rights and fundamental freedom of indigenous people” (26 September 2007) and “Canadian Explanation of Position: Report from the United Nations Permanent Forum on Indigenous Issues”, Statement to the Economic and Social Council (24 July 2008).

⁴ *Human Rights Council*, GA Res. 60/251, UN GAOR, 60th Sess., Supp. No. 49, UN Doc. A/60/49, Vol. III (2007) 2 at para. 9.

⁵ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 348.

⁶ *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 53.

⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 (entered into force 4 January 1969).

⁸ CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 29.

⁹ Governor James Douglas, *Proclamation*, (14 February, 1858).

9. The *Declaration* affirms the rights of Indigenous peoples to self-determination¹⁰ and to their lands, territories and resources.¹¹ States are to “give legal recognition and protection to these lands, territories and resources ... with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”.¹² Further, Indigenous peoples have the right to redress for their lands, territories and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.¹³
10. Canada is also obliged under domestic law to respect the rights of Indigenous peoples. Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.¹⁴ The Supreme Court of Canada (“SCC”) has held that section 35 is directed towards “the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory”.¹⁵ The SCC has found that section 35 recognizes and affirms communal Aboriginal title. Aboriginal title has an “inescapable economic component”, and title-holders have the right to the exclusive use and occupation of the land and to choose the uses to which the land is put.¹⁶ According to the SCC, “the honour of the Crown” is always at stake in Canada’s dealings with Aboriginal peoples.¹⁷ Canada is bound to act in the best interests of Aboriginal peoples such that the honour of the Crown is upheld.

Canada’s strategy of “rights-denial” in litigation

11. Despite these domestic and international obligations, Canada continues to deny the title and rights of First Nations instead of advancing reconciliation based on rights recognition.¹⁸ While courts do not question the validity of Canada’s title and sovereignty, Canada constantly puts First Nations to proof and forces them into lengthy, expensive litigation to defend their inherent rights. In court, First Nations are pitted against the substantial resources of the Crown, and in many cases, entire industry groups. First Nations have gone before the SCC in some 40 times, but to date, no declaration of Aboriginal title has been made. This denial creates an “implementation gap”¹⁹ in Canada regarding Aboriginal title and rights – that is, there is a vacuum between constitutional rights, Canada’s obligations under international human rights law and Canada’s administrative, legal and political practice, such that effective legal remedies are not available to First Nations.
12. The CERD has expressed concern that “claims of Aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the

¹⁰ *Supra* note 1, arts 3, 4.

¹¹ *Ibid.*, arts 25, 26.

¹² *Ibid.*, art. 26(3); see also art. 27.

¹³ *Ibid.*, art. 28.

¹⁴ Defined to include the “Indian, Inuit and Métis peoples of Canada”: *Constitution Act, 1982*, s 35(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

¹⁵ *R v Van der Peet* [1996] 2 SCR 507 at para. 36.

¹⁶ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para. 166.

¹⁷ *R v Sparrow* [1990] 1 SCR 1075 at 1114.

¹⁸ First Nations have repeatedly objected to the Crown’s denial of rights and its failure to implement jurisprudence concerning Indigenous peoples’ rights: see, eg, Annexure A: First Nations Summit, “Implementation of Jurisprudence Concerning Indigenous Peoples’ Rights: Experiences from the Americas – A Canadian Perspective” (October 2005) (Report only, without annexures).

¹⁹ Economic and Social Council, “Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People” UN Doc. E/CN.4/2006/78 (2006) at para. 83.

strongly adversarial positions taken by the federal and provincial governments”.²⁰ Canada and BC have failed to heed these concerns. For example, the efforts of the Tsilhqot’in Nation to protect their rights in response to forestry activities in their traditional territory indicate that the “strongly adversarial positions” of Canada and BC persist. The *Tsilhqot’in Nation v British Columbia* trial was one of the longest civil trials in the history of Canada, lasting 339 days over five years, at enormous financial and human cost.

13. Rather than recognize Aboriginal title to the entire traditional territory of the Tsilhqot’in Nation, Canada and BC sought to limit any declaration of Aboriginal title to small sites where specific activities or practices took place. In his decision of 20 November 2007, Justice Vickers of the Supreme Court of British Columbia regarded this as an “impoverished view of Aboriginal title”.²¹ Although the Tsilhqot’in Nation had satisfied the legal test for Aboriginal title to almost half of the area claimed and certain other lands, Justice Vickers was unable to issue a declaration of title due to a legal technicality. However, he held that the Tsilhqot’in Nation possessed certain Aboriginal rights throughout the claim area.
14. Justice Vickers stated that “the time to reach an honourable resolution and reconciliation is with us today”, yet considered that courts are “ill equipped” to effect this.²² The FNS calls upon Canada and BC to cease forcing First Nations into expensive protracted litigation to defend their rights.

Crown Negotiation mandates

15. The SCC has stated that negotiation (rather than litigation) is the preferred method for achieving the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.²³ Once First Nations find themselves back in negotiations, the Crown resumes its strategy of denial and key legal principles established by the Courts are routinely ignored by Crown negotiators. In fact, the Crown attempts to pre-determine the outcome of negotiations by insisting that any resolution fit within their existing unilaterally developed negotiation policies and mandates, which are largely designed to preserve its own interests and the status quo. Since 1993, many First Nations have entered into modern treaty negotiations with Canada and BC. Currently, 60 negotiation tables (representing over 120 of the 203 First Nations in BC) are at various stages of negotiations. However, modern-day treaty negotiations have yet to achieve reconciliation due to the unreasonable negotiating mandates of Canada and BC. Even after historic treaties (e.g. Douglas Treaties and Treaty 8) as well as modern agreements (e.g. Nisga’a, Tsawwassen, and Maa-nulth) are concluded, there are serious concerns by First Nations about full and proper implementation.
16. Only two agreements negotiated with Canada and BC pursuant to this process have been ratified by First Nations parties.²⁴ The FNS respects and supports the decisions of these First Nations to ratify

²⁰ CERD, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada” UN Doc. CERD/C/CAN/CO/18 (2007) at para. 22.

²¹ *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 at para. 1376.

²² *Ibid.* at paras 1338, 1357.

²³ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at paras 186, 207. See also *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 at paras 1338 – 1382.

²⁴ The Tsawwassen First Nation ratified the Tsawwassen First Nation Final Agreement (“TFNFA”) on 25 July 2007. Legislation to give effect to the TFNFA received Royal Assent in BC on 22 November 2007 and federally on 26 June 2008. The Maa-nulth First Nations Final Agreement (“MFNFA”) was ratified by the Maa-nulth First Nations in a series

their agreements. However, it also recognizes the growing frustration expressed by most First Nations regarding the inflexible and insufficient treaty negotiation policies and mandates pursued by Canada and the Province of BC within treaty negotiations. First Nations have raised these concerns for many years.²⁵

17. In particular, First Nations object to the Crown's requirement that their rights be "exhaustively" set out in agreements made pursuant to the treaty negotiation process in BC, thereby achieving a "full and final settlement" of the First Nations' "claims" to Aboriginal title and rights. To achieve "certainty", Canada insists that Aboriginal title and rights can continue only as "modified" by, and set out in, the agreement. Further, the First Nations parties must agree to indemnify Canada and BC in respect of legal claims regarding the existence of Aboriginal rights, including title, that are other than, or different in attributes or geographic extent from, the rights as set out in the agreement.²⁶
18. In the past, Canada explicitly required the extinguishment or surrender of inherent Aboriginal rights in return for the rights granted by a treaty.²⁷ Canada has recently asserted to the international community that it no longer requires the extinguishment or surrender of rights in treaty negotiations.²⁸ Instead, it demands the "modification" of Indigenous rights. However, international human rights bodies have repeatedly found that there is no distinction in practical effect between the "extinguishment" and "modification" of Aboriginal title and/or rights, and have recommended that there be no extinguishment of rights regardless of the form or wording adopted in final agreements.²⁹ Canada has failed to implement these recommendations.
19. Other elements of the negotiating mandates of Canada and BC which exacerbate the problems associated with a "full and final settlement" of rights include:
 - the quantum of land on offer at treaty negotiating tables is a small percentage of the traditional territories of First Nations – far too small to sustain their distinct societies;
 - Canada will not consider restitution, including compensation, for land unilaterally taken and transferred to third parties, significantly reducing the land base which is available for treaty settlements;
 - the treaty negotiations must be forward-looking political processes (thereby precluding any negotiation of compensation for rights violations); and
 - Aboriginal title must be "modified" into the fee simple lands set out in a final agreement.

of ratification votes in July and October 2007. Provincial legislation to give effect to the MFNFA received Royal Assent in BC on 29 November 2007. Royal Assent to federal legislation giving effect to the MFNFA is also required.

²⁵ See, eg, Annexure B: First Nations Summit, "Framework for 'Advancing Recognition & Reconciliation' & 'Improving the Lives of First Nations People' in British Columbia" (September 2005).

²⁶ See TFNFA, clauses 2.11 – 2.14, 2.17; MFNFA, clauses 1.11.1 – 1.11.4, 1.11.7.

²⁷ See, eg, James Bay and Northern Quebec Agreement (1975).

²⁸ See, eg, CERD, "Consideration of Reports, Comments and Information Submitted by States Parties under Article 9 of the Convention: Seventeenth and eighteenth periodic reports of Canada" UN Doc CERD/C/SR.1790 (2007) at para. 46.

²⁹ See, eg, Human Rights Committee, "Concluding Observations of the Human Rights Committee: Canada" UN Doc. CCPR/C/79/Add.105 (1999) at para. 8; Economic and Social Council, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum, Mission to Canada" UN Doc. E/CN.4/2005/88/Add.3 (2004) at paras 20, 99; Committee on Economic, Social and Cultural Rights, "Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada" UN Doc. E/C.12.CAN/CO/4 & E/C.12.CAN/CO/5 (2006) at para. 16; CERD, *supra* note 17, at para. 22.

20. Further, the Crown's approach is for 80% of treaty negotiation support funding for First Nations to be advanced as loans to be drawn against final treaty settlements. First Nations in British Columbia have borrowed \$318 million to prepare for and negotiate treaties,³⁰ and many now find their growing debt burden too onerous to remain in negotiations. Indigenous peoples have the right to have access to financial and technical assistance from States for the enjoyment of rights contained in the *Declaration*.³¹ It is a fundamental breach of the rights of Indigenous peoples to their land, territories and resources for First Nations in British Columbia to be required to borrow money from governments to resolve issues created by the governments' historic and present denial of Aboriginal title and rights.

IV. Role of Canadian Courts

21. Increasingly, in our pursuit of justice, First Nations are being forced into costly litigation to defend our Aboriginal title and rights. As all Canadians do, First Nations have an expectation of procedural fairness. An unbiased appearance is an essential component of procedural fairness and judicial impartiality. When all other avenues have been exhausted and First Nations are forced to turn to litigation as a last resort in defending our title and rights, it is alarming and problematic when situations give rise to questions of judicial impartiality. For example, the 2003 case of the *Wewaykum Indian Band v. Canada* was heard and decided by the SCC in 2003. Justice Ian Binnie wrote the decision for the Court. The *Wewaykum Indian Band* challenged Justice Binnie's judicial impartiality, citing concerns of reasonable apprehension of bias due to his previous involvement with the case as a senior lawyer with the Department of Justice (17 years before writing the decision for the court). The *Wewaykum Indian Band* was disappointed when an internal review determined that there was no reasonable apprehension of bias.

V. Conclusion

The FNS acknowledges Prime Minister Harper's 11 June 2008 apology for Canada's involvement in the Indian Residential Schools system. Now it is time to move from apology to action. As a member of the HRC, Canada must adhere to the highest standards of human rights. At a minimum, Canada must endorse and implement the *Declaration*. Canada's position regarding Aboriginal title, rights and treaty negotiations consistently impedes efforts by First Nations to exercise their right to self-determination and to improve the socioeconomic conditions of their communities. Canada's denial of First Nations' land rights falls well short of the minimum standards affirmed by the *Declaration* and demonstrates a clear failure by Canada to implement its human rights obligations. Prime Minister Harper's apology to survivors of Indian residential schools and to their families (June 11, 2008) acknowledged that such a policy of assimilation was wrong and has created great harm and has no place in our country. It is no accident that First Nations find themselves largely in the margins of Canada's social and economic well-being. Given this history, the pattern of conduct of Indigenous Peoples has been one of perseverance, persistence, and patience.

22. Canada's policy of denying Aboriginal title and rights is premised on the very same attitudes that Prime Minister Harper referred to in his residential school apology. It is time for these attitudes and

³⁰ British Columbia Treaty Commission, *Annual Report* (2007) at 39.

³¹ *Supra* note 1, art. 39.

any policies flowing from them to be cast aside. This journey to reconciliation and the path to justice must include Canada's judiciary, as they too have played, and will continue to play, a significant role in clearing the path to justice for Aboriginal people.