EMRIPQU12

Expert Mechanism on the Rights of Indigenous Peoples
Fifth session, Geneva
9-13 July 2012
Agenda Item 6: United Nations Declaration on the Rights of Indigenous Peoples

Joint Statement of the Grand Council of the Crees (Eeyou Istchee), First Nations Summit, Union of British Columbia Indian Chiefs, Assembly of First Nations, Haudenosaunee of Kanehsatake and Canadian Friends Service Committee (Quakers)

Speaker: Paul Joffe

Thank you for this opportunity to address this agenda item on the *UN Declaration on the Rights of Indigenous Peoples*. We strongly support and encourage the efforts of States, in conjunction with Indigenous peoples, to achieve best practices in adopting measures and implementing strategies to fully realize the provisions of this consensus international human rights instrument.

In order to achieve best practices, it is necessary to also examine the *challenges* that Indigenous peoples face in implementing their rights consistent with the *UN Declaration* and other international human rights standards and law.

In this context, we wish to bring to your attention the judgment of the British Columbia Court of Appeal in *Tsilhqot'in Nation* v. *British Columbia*, rendered on 27 June 2012.[1] This ruling, if not reversed by Canada's highest court, could set a dangerous precedent for Indigenous peoples.

Indigenous title

In regard to Indigenous or Aboriginal title, Mr. Justice Groberman on behalf of the Court of Appeal ruled:

> I do not see a broad territorial claim as fitting within the purposes behind s. 35 of the Constitution Act, 1982 or the rationale for the common law's recognition of Aboriginal title. ... I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians ...[2]

How is it possible that a "broad territorial claim" does not "fit" with the purposes of Canada's Constitution or with the common law's recognition of Aboriginal title? How can such broad "claims" be antithetical to the goal of reconciliation? Given the rationale and decision of the Court, has "aboriginal title" of Indigenous peoples to their territories been effectively extinguished judicially?

Section 35 of the *Constitution Act, 1982* recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". According to the Supreme Court of Canada, the protection of such Aboriginal and Treaty rights is an underlying constitutional principle and value.[3] The Supreme Court ruled that the constitutional obligation to protect Aboriginal and Treaty rights is a "national commitment".[4]

The Supreme Court has added: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[5] The Court has not determined that "broad territorial claims" are inconsistent with Canada's Constitution and its objective of reconciliation. For any domestic court to imply that small territorial assertions of title by Indigenous peoples might be acceptable, but not "broad" ones raises serious discrimination concerns.

Whenever Canada has sought to obtain surrenders or extinguishments of "Aboriginal" or "Indian" title, it has placed such title in very broad territorial contexts.[6] Yet when Indigenous peoples assert the same title in the courts, Canada seeks to severely diminish title to "postage stamp" areas.

In regard to "native title" in the common law, the High Court of Australia ruled in *Mabo* v. *State of Queensland* that the common law of Australia "recognizes a form of native title which ... reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands".[7] In 1996, Canada's highest court decided: "... the analysis of the basis of aboriginal title in the landmark decision of the High Court in Mabo v. Queensland [No. 2] (1992) ... is persuasive in the Canadian context."[8]

Yet the governments of Canada and British Columbia teamed up to oppose the assertion of Indigenous title by the *Tsilhqot'in Nation* – claiming that only small site-specific areas may be subject to title claims.

Throughout Canada's history, in virtually every court case relating to Aboriginal and Treaty rights, the government of Canada chooses to act as an adversary. No other people in Canada are automatically subjected to such consistently adverse[9] and discriminatory treatment.[10]

***UN Declaration* must be respected**

Such actions are not consistent with the *UN Declaration*. The *Declaration* is an instrument for justice and reconciliation. It is a beacon and catalyst for achievement, well-being and renewed hope.

Article 26(2) of the *UN Declaration* affirms: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use ..." This core right includes Indigenous title.

In February 2012, in regard to the *Declaration*, Canada indicated to the UN Committee on the Elimination of Racial Discrimination (CERD) that "Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution."[11]

In regard to litigation in Canada, CERD expressed concern in August 2002 that "to date, no Aboriginal group has proven Aboriginal title" and recommended that Canada examine ways and means to facilitate the establishment of such proof.[12] As exemplified by the *Tsilhqot'in Nation* case, the situation remains unchanged. Notwithstanding this, the Supreme Court of Canada in the early 1970s decided that "Indian title" had not been extinguished in British Columbia. This has been reiterated in many subsequent cases. Yet Canada and British Columbia consistently

assert that aboriginal title, considered an aboriginal right under s.35, must be proven in a court before it will exists.

Use of "principle of discovery"

In denying Indigenous peoples broad territorial assertions to title, the B.C. Court of Appeal invoked the "principle of discovery"[13] (or doctrine of discovery). The Appeal Court Justices say: "European explorers considered that by virtue of the 'principle of discovery' they were at liberty to claim territory in North America on behalf of their sovereigns."

The *UN Declaration* unequivocally affirms:

> ... all doctrines, policies and practices based on advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust ...

Similar rejection of doctrines of superiority is found in the *International Convention on the Elimination of All Forms of Racial Discrimination*[14] and in the 2001 Durban *Declaration* on racism and racial discrimination.[15] As recently as September 2011, the UN Human Rights Council by consensus "condemned" doctrines of superiority "as incompatible with democracy and transparent and accountable governance".[16]

As with the discredited notion of "terra nullius", the doctrine of "discovery" was used to legitimize the colonization of Indigenous peoples.[17] It was used to dehumanize, exploit and subjugate Indigenous peoples and dispossess them of their most basic rights.

In the contemporary context of justice, reconciliation and international human rights, the doctrine of discovery must have no place whatsoever in determining Indigenous peoples' title and rights. True implementation of the *UN Declaration* requires the repudiation of this racist and colonial doctrine.[18]

Recommendation

We recommend that EMRIP consider the following:

1. For full and effective implementation of the *UN Declaration*, Canada and other States must abandon any policies that serve to deny the existence of Aboriginal title and unjustly place the burden of proof on Indigenous peoples that have territorial rights based on original occupation.

2. Affirmation of Indigenous peoples' title to lands, territories and resources is critical for their survival, dignity, security and well-being. States and domestic courts must abandon any use of or reliance on "extinguishment" of Indigenous peoples' rights. Extinguishment is a relic of colonialism and such destruction of rights is incompatible with international human rights law.

3. The doctrine of discovery is racist and has no place in international and domestic law. States and courts must not rely on this fictitious doctrine so as to *purportedly* diminish or extinguish Indigenous peoples' sovereignty and title.

4. International human rights law is a legitimate and important influence on the development of the common law. Any common law doctrine founded on discrimination in the enjoyment of Indigenous peoples' rights demands reconsideration.

Endnotes

[1] *Tsilhqot'in Nation* v. *British Columbia*, 2012 BCCA 285.

[2] *Ibid.*, para. 219. [underline added]

[3] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, paras. 32, 84. In regard to underlying constitutional principles, see also para. 49: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."

[4] *R.* v. *Marshall* (No. 2), [1999] 3 S.C.R. 533, para. 45.

[5] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 1.

[6] See, *e.g. Dominion Lands Act*, 1872, s. 42:"None of the provisions of this Act respecting the settlement of agricultural lands, or the lease of timber lands, or the purchase and sale of mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."

[7] Such recognition of title would apply unless title was already extinguished: see *Mabo et al.* v. *State of Queensland [No. 2]*, (1992) 175 C.L.R. 1 (High Court of Australia), para. 2 (*per* Mason CJ and McHugh J.). See also *Takamore* v. *Clarke*, [2011] NZCA 587, *per* Glazebrook and Wild JJ (New Zealand Court of Appeal), para. 254:

> We consider that a more modern approach to customary law is to try to integrate it into the common law where possible rather than relying on the strict rules of colonial times. This conclusion is reinforced by the need to develop the common law, so far as is reasonably possible, consistently with the Treaty of Waitangi, the importance of recognising the collective nature of the culture of indigenous peoples and the value of their diversity (as recognised in particular by the United Nations Declaration on the Rights of Indigenous Peoples) and by international human rights covenants to which New Zealand is a party. [underline added]

[8] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 38.

[9] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1108: "The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

[10] In contrast, in litigation within the United States, it is very common for the federal government to act as *amicus curiae* in support of an Indigenous tribe or individual. See, *e.g.*, *Nevada* v. *:Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Company, Inc.*, v. *Shirley*, 532 U.S. 645 (2001); *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc*, 523 U.S. 751 (1998); *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Duro* v. *Reina*, 495 U.S. 676 (1990); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1984); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983); and *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[11] Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (*continued*): *Nineteenth and twentieth periodic reports of Canada* (continued)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39.

[12] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* UN Doc. CERD/C/61/CO/3 (23 August 2002), para. 16. And at para. 17: "The Committee views with concern the direct connection between Aboriginal economic marginalisation and the ongoing dispossession of Aboriginal people from their land".

[13] *Tsilhqot'in Nation* v. *British Columbia, supra* note 1, para. 166.

[14] *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble. See also article 4.

[15] *Declaration*, adopted at World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, 8 September 2001, preamble and para. 7.

[16] Human Rights Council, *Incompatibility between democracy and racism*, UN Doc. A/HRC/RES/18/15 (29 September 2011), para. 5.

[17] The UN General Assembly has declared: "... continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law": see General Assembly, *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 2621 (XXV), October 12, 1970, para. 1.

[18] See also Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(2), at 557: "Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a *greater share of the lands and resources* in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be *pushed to the edge of economic, cultural and political extinction.*" [emphasis added]