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Agenda Item 4: Follow-up to thematic studies and advice
July 8, 2014

Good morning to all delegations. I wanted to acknowledge the new member and congratulate him for undertaking his first obligation with great seriousness. I would like to provide a brief update on two recent developments in Canada that informs the previous studies of the Expert Mechanism. First of all, related to the Study on the Right to Education and the Study on the Role of Languages and Culture, I wanted to inform everyone that work continues on First Nation Control of First Nations Education in Canada. Secondly, I would like to inform you on a recent development related to the Expert Mechanism's Follow-up Study on the Right to Participate in Decision-making, with a focus on extractive industries, on June 26, 2014, the Supreme Court of Canada, the highest court in Canada, rendered a unanimous decision declaring the existence of Aboriginal title for the Tsilhqot'in People in *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44.

In my written statement, I will provide the full headnote, or summary of this case, but in the interests of time, I would like to highlight three particular passages of significance:

> "**For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim."**
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> **Many of you who were here at the 6th Session of the Expert Mechanism heard the presentation of the then Chair of the Permanent Forum on Indigenous Issues, Grand Chief Ed John on this case. This is a follow-up to his presentation.**

"The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence

or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the Constitution Act, 1982. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). **Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.**

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the Forest Act applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 Constitution Act, 1982 and the division of powers in the Constitution Act, 1867, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the Forest Act on its face applied to the land in question at the time the licences were issued. The British Columbia legislature

clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the Forest Act at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the Forest Act no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the Forest Act, is ousted by the s. 35 framework or by the limits on provincial power under the Constitution Act, 1867. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the Constitution Act, 1867. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the Forest Act, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the Constitution Act, 1982 and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that

preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the Forest Act were inconsistent with its duties owed to the Tsilhqot'in people."

This case relates to the Expert Mechanism's Follow-up Study on the Right to Participate in Decision-making, with a focus on extractive industries, in that the Supreme Court of Canada has held that States have a legal duty to ensure adequate consultation is undertaken to obtain the consent of Indigenous peoples, as set out in Advice No. 4, paragraph 8 which instructs that:

> **8. States must take full responsibility in ensuring that adequate consultation is undertaken to obtain consent. A State cannot delegate its responsibility, even where it engages third parties to assist in consultation mechanisms (A/HRC/18/35, para.63). Consultation is often the starting point for seeking the free, prior and informed consent of indigenous peoples. If the potential impact or impact is quite minor, the requirement to seek the free, prior and informed consent of indigenous peoples may not necessarily be required. Nonetheless, as stated in advice No. 2, 'the objective of consultations should be to achieve agreement or consensus' (A/HRC/18/41, annex, para.9).**

Further, this case supports paragraph 26(b) of our study, as follows:

> **"26. As regards the first pillar of the Guiding Principles, the State duty to protect against human rights abuse by third parties, the following key points may be especially relevant to business activities that affect indigenous peoples:**
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> **(b) The State duty to protect the human rights of indigenous peoples in the context of business activities also applies when granting development licences and permits relating to indigenous peoples' lands, territories and resources. As provided by relevant standards on the specific rights of indigenous peoples, the State should take into account the full participation of indigenous peoples at all stages of decision-making in such processes."**

Hai Hai. (Thank you)