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FIRST NATIONS STRATEGIC BULLETIN

FIRST NATIONS STRATEGIC POLICY COUNSEL

Canada Responds to Tsilhqot'in Supreme Court Case: *Extinguishment or Nothing!*

Natural Resources Minister Joe Oliver, left, shakes hands with Douglas Eyford, Special Federal Representative on West Coast Energy Infrastructure, after he released the final report on enhancing engagement of Aboriginal groups in resource development and environmental protection, during a news conference in Vancouver, B.C., on Thursday December 5, 2013. (Photo courtesy of CP, Daryl Dyck)

By Russell Diabo and Dr. Shiri Pasternak

"***Our government believes that the best way to resolve outstanding Aboriginal rights and title claims is through negotiated settlements,***" stated **Minister of Aboriginal Affairs and Northern Development Canada (AANDC) Bernard Valcourt** on the day the final **Tsilhqot'in** decision came down in June.

After 25 years of litigation, millions of dollars in legal fees, and 399 days in court for the Supreme Court hearing alone, the Tsilhqot'in people might have preferred a negotiated settlement, too.

But not the kind the Government of Canada was offering. The Minister was referring to the **Comprehensive Land Claims policy**, the Government's preferred method for dealing with unceded Indigenous territory in Canada.

For critics of **Canada's Comprehensive Land Claims policy**, the federal government's response to the Supreme Court decision conveyed an automatic and outright denial of the Court's watershed finding that the Tsilhqot'in Nation held **underlying Aboriginal title** to their territorial lands.

Whereas, the land claims policy, referred to by critics as the "***termination tables***," requires Aboriginal groups precisely to **cede** their Aboriginal title and circumscribe their Aboriginal rights upon settlement through the use of two legal techniques:

"***Modification***" of Aboriginal Title and/or "***Non-Assertion***" of rights.

To push the land claims policy at a moment when the Supreme Court of Canada successfully challenged one of its worst aspects – extinguishment – was a stark message for the federal government to send.

At a press conference in the weeks following Canada's initial reaction, **Minister Valcourt** expanded on his Department's approach to unceded Indigenous lands, now evading any mention of the **Tsilhqot'in** decision.

Valcourt introduced new measures to promote "***reconciliation***" in advance of and outside of the **Comprehensive Land Claims policy** and to accelerate the signing of "***modern treaty***" agreements.

He also promised the introduction of new consultation guidelines for government and industry with regards to First Nations over natural resources. Would these changes reflect the recognition of Aboriginal title made in **Tsilhqot'in**?

Special points of interest:

- **Harper's Response to SCC Tsilhqot'in Case is Bogus Consultation Process**
- **Four Algonquin First Nations School Feds Special Representative on Aboriginal Title**
- **Settler-States Hijack UN Conference on Indigenous Peoples & Water Down UNDRIP**

Inside this issue:

Bernard Valcourt with PM Harper when named as federal Minister of Aboriginal Affairs.

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Consultation as extinguishment

At the press conference, **Minister Valcourt** announced the appointment of **Douglas Eyford** as the **Ministerial Special Representative** to assist Canada to reform the **Comprehensive Land Claims policy**.

This appointment signals an end to the **Assembly of First Nations (AFN) – Canada Comprehensive Claims Senior Oversight Committee (SOC)**. **Prime Minister Harper** established **SOC** during a meeting with the **Assembly of First Nations** in Ottawa on January 11, 2013 in order to address grievances with the policy. But the appointment of **Eyford** marks the real direction the government is taking to address First Nations' grievances.

In 2013, **Eyford** acted as the Government's **Special Federal Representative on West Coast Energy Infrastructure**. The "***Eyford Report***" focused on consultation and engagement with First Nations over energy infrastructure. The report mentions Aboriginal title only once, in passing. Thus, **Eyford** has been instrumental in creating the template for denying Aboriginal title through consultative mechanisms.

"The federal government is fighting tooth and nail against ceding an inch of legal authority over land despite the pronouncement from the highest court in the land"

The focus of consultation in his 2013 report is on "***reconciliation.***" However, it is clear from the report that it is Indigenous peoples who must do all of the reconciling of their pre-existing sovereignty with Canadian claims to underlying title.

The mandate of the **Eyford Report** is linked to the Government of Canada's agenda of expanding export markets for oil and gas. Spelled out early in the report, Canada's priority is the need to "***capitalize***" on global energy demands, therefore "***to construct pipelines and terminals to deliver oil and natural gas to tidewater***."

The Projects listed as crucial here are the expansion of **Kinder Morgan's** existing **Trans Mountain Pipeline**, **Enbridge's Northern Gateway Pipeline**, and several proposed natural gas pipelines and related upstream developments. Projects also include the development of **liquefied natural gas (LNG)** facilities in Kitimat and Prince Rupert, tied most directly to potential Asian markets.

The "***impediment***" to Canada's diversified energy market – crucial because Canada's principal customer is the United States, which is expanding its energy sources – is that Aboriginal peoples hold constitutionally protected title and rights with which industry and government must legally comply. In other words, the objective of Aboriginal Affairs' recent announcement on the land claims policy was not to reconcile the policy with the Supreme Court's findings on Aboriginal title, but to accelerate the policy framework of Aboriginal title extinguishment, particularly in the areas of major resource development projects like the proposed pipelines in British Columbia.

The Black Box

L to R: Jody Wilson-Raybould, BC-AFN Regional Chief & BC Premier Christy Clark.

The federal government is fighting tooth and nail against ceding an inch of legal authority over land despite the pronouncement from the highest court in the land.

According to figures recently released by Parliament (as reported in the Law Times), oil and gas disputes have been the top expense for **AANDC** for the past three years.

The federal government has been either fighting First Nations in court – the last resort for Indigenous peoples trying to defend and protect their lands – or pushing groups into the **Comprehensive Land Claims policy**, many of them through the **British Columbia Treaty Commission process**, since 50 percent of the current **Comprehensive Land Claims negotiation tables** are in British Columbia.

So, what should the Government of Canada's response have been to the **Tsilhqot'in** decision?

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When the **SCC Delgamuukw** (1997) decision came down, recognizing that Aboriginal title underlies provincial fee simple interest in the land, by a resolution of the Chiefs-in-Assembly, the **AFN** established a group to leverage the Supreme Court decision to change the **Comprehensive Land Claims policy**. The **AFN Delgamuukw Strategic Implementation Committee (DISC)** commissioned a legal analysis, prepared by **Mark Stevenson**, to find any discrepancies between the policy and the decision.

Two initiatives sprung from **AFN-DISC**: an **Aboriginal Title Alliance** and an **aborted judicial review** undertaken by the **Assembly of First Nations** to examine the Minister of Indian Affairs' decision not to review the policy, given the groundbreaking ruling. Both of these efforts failed due to internal division between First Nations leaders who had agreed to negotiate under Canada's **Comprehensive Land Claims policy** and those First Nations leaders who are **not** negotiating under the **Comprehensive Claims policy**.

Perhaps a new **Aboriginal Title Alliance** will form today. Are there too many Aboriginal groups at the Comprehensive Land Claims negotiating tables that have borrowed money from the federal government for land claims negotiations to exert any pressure on the government to change the policy, as has been the case in the past? Or can a political movement of Aboriginal Title holding groups build the unity and strength to hold Canada to account for administering illegal unjust policies that violate Aboriginal title, rights and international protocols protecting Indigenous peoples from land dispossession?

There are fundamental changes that Canada could make to reform the Comprehensive **Land Claims policy** for the better. In her decision, **Justice McLachlin** specifically rejected what **UBCIC Grand Chief Stewart Philip** called the "***postage stamp***" theory of Aboriginal title. Instead, the court opted for a more expansive understanding of Indigenous land rights over a broad territorial range. Yet the **land selection process** under the **Comprehensive Land Claims policy** is precisely the kind of site-specific approach to addressing underlying Aboriginal title that the **SCC** rejected. The entire territorial range including private lands should be on the table at least for compensation and Aboriginal title should not be extinguished upon settlement or transformed into private property.

Currently, there is no way to get a **Declaration of Aboriginal Title** in Canada without enduring a costly and timely research process and court case, which most groups cannot afford. The **Comprehensive Land Claims policy** is the sole federal policy by which unceded lands may be settled, yet it requires that bands extinguish their pre-existing Aboriginal title through a negotiated title conversion process into **fee simple title**. What alternatives exist?

Valcourt clearly signaled that Canada is not willing to change the structure of settler colonialism in Canada. Only a political movement of Indigenous Peoples and supporters from Canadian civil society who support justice and reconciliation with Indigenous peoples will convince him otherwise.

Protesters demonstrating against the Enbridge Northern Gateway Pipeline march through the streets in Vancouver, B.C., on Monday, Jan. 14, 2013. (Photo courtesy of CTV)

Former Neskonlith Chief Art Manuel was Co-Chair of AFN-DISC

"The entire territorial range including private lands should be on the table at least for compensation and Aboriginal title should not be extinguished upon settlement or transformed into private property"

Canada's Supreme Court of Canada, Chief Justice Beverly McLachlin

"This is what dispossession by negotiation looks like. The government demands that First Nations trade away – or in the original term, to "extinguish" – their rights to 95% of their traditional territory. Their return is some money and small parcels of land, but insidiously, as private property, instead of in the collective way that indigenous peoples have long held and stewarded it"

The Indigenous Land Rights Ruling That Could Transform Canada

By Martin Lukacs, the guardian

"***Indigenous rights offer a path to a radically more just and sustainable country – which is why the Canadian government is bent on eliminating them***"

The unrest is palpable. In First Nations across Canada, word is spreading of a historic court ruling recognizing Indigenous land rights. And the murmurs are turning to action: an eviction notice issued to a railway company in British Columbia; a park occupied in Vancouver; lawsuits launched against the Enbridge tar sands pipeline; a government deal reconsidered by Ontario Algonquins; and sovereignty declared by the Atikamekw in Quebec.

These First Nations have been emboldened by this summer's **Supreme Court of Canada William decision**, which recognized the aboriginal title of the **Tsilhqot'in nation** to 1,750 sq km of their land in central British Columbia – not outright ownership, but the right to use and manage the land and to reap its economic benefits.

The ruling affects all "***unceded***" territory in Canada – those lands never signed away through a treaty or conquered by war. Which means that over an enormous land mass – most of British Columbia, large parts of Quebec and Atlantic Canada, and a number of other spots – a new legal landscape is emerging that offers the prospect of much more responsible land stewardship.

First Nations are starting to act accordingly, and none more so than the **Tsilhqot'in**. They've declared a tribal park over a swath of their territory. And they've announced their own policy on mining – a vision that leaves room for its possibility, but on much more strict environmental terms. Earlier this month they erected a totem pole to overlook a sacred area where copper and gold miner **Taseko** has for years been controversially attempting to establish itself; no mine will ever be built there.

And the Canadian government's response? Far from embracing these newly recognised indigenous land rights, they are trying to accelerate their elimination. The court has definitively told Canada to accept the reality of aboriginal title: the government is doing everything in its power to deny it.

Canadians can be pardoned for believing that when the country's highest court renders a decision, the government clicks their heels and sets themselves to implementing it. The judiciary directs, the executive branch follows: that's how we're taught it works. But it doesn't always – and especially not when what's at stake is the land at the heart of Canada's resource extraction.

The new land rights ruling is now clashing directly with the Canadian government's method for cementing their grip on land and resources. It's a negotiating policy whose name – the so-called Comprehensive Land Claims – is intended to make your eyes glaze over. But its bureaucratic clothing disguises the government's naked ambition: to grab as much of indigenous peoples' land as possible.

This is what dispossession by negotiation looks like. The government demands that First Nations trade away – or in the original term, to "***extinguish***" – their rights to 95% of their traditional territory. Their return is some money and small parcels of land, but insidiously, as private property, instead of in the collective way that indigenous peoples have long held and stewarded it. And First Nations need to provide costly, exhaustive proof of their rights to their own land, for which they have amassed a stunning $700 million in debt – a debt the government doesn't think twice about using to arm-twist.

Despite the pressure, most First Nations have not yet signed their names to these crooked deals – especially when the supreme court is simultaneously directing the government to reconcile with First Nations and share the land. But the supreme court's confirmation that this approach is unconstitutional and illegal matters little to the government. What enables them to flout their own legal system is that Canadians remain scarcely aware of it.

Acting without public scrutiny, **prime minister Stephen Harper** is trying to shore up sup-

'Land Rights Ruling' conclusion from page 4

port for this policy – now 40 years old – to finally secure the elimination of indigenous land rights. The process is led by the same man, **Douglas Eyford**, who has been Harper's advisor on getting tar sands pipelines and energy projects built in western Canada. That is no coincidence. The government is growing more desperate to remove the biggest obstacle that stands in the way of a corporate bonanza for dirty fossil fuels: the unceded aboriginal title of First Nations – backed now by the supreme court of Canada.

A public commenting period opened during the government's pr blitz has created an opportunity for the indigenous rights movement and concerned Canadians to demand a long-overdue change in the government's behaviour. Recognising aboriginal title, restoring lands to First Nations management, would be to embrace the diversity and vision we desperately need in this moment of ecological and economic crisis.

Because the government agenda is not just about extinguishing indigenous land rights. It's about extinguishing another way of seeing the world. About extinguishing economic models that prize interdependence with the living world, that recognise prosperity isn't secured by the endless depletion of resources. And about extinguishing a love for the land, a love rooted in the unique boundaries and beauty of a place.

"***The land is the most important thing***," **Tsilhqot'in chief Roger William** told me. "***Our songs, our place names, our history, our stories – they come from the land that we are a part of. All of it is interrelated with who we are***."

The few days I spent in **Tsilhqot'in territory** five years ago made that vivid. It is a land of snow-capped mountains – Ts'il-os, who in their stories was a man transformed into giant rock after separating from his wife. Wild horses stalk the valleys. Salmon smoke on drying racks. The Tsilhqot'in carefully protect and nurture these fish – running stronger in their rivers than anywhere else in the province.

That's why the habit of government officials, of media and even of supreme court judges to call the Tsilhqoti'in "***nomadic***" bothers **William** so much: his people have lived on these lands for thousands of years, while it is non-natives who are constantly moving and resettling. And what could be more nomadic and transient than the extractive industry itself – grabbing what resources and profits it can before abandoning one area for another.

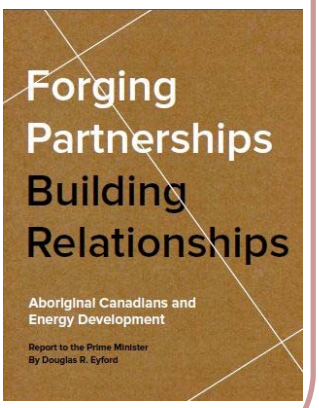
As Canadians look more closely, they are discovering that the unceded status of vast territories across this country is not a threat, as they've long been told. It is a tremendous gift, protected with love by indigenous nations over generations, to be seized for the possibilities it now offers for governing the land in a radically more just and sustainable way for everyone.

In this battle between the love of the land and a drive for its destruction, those behind the extractive economy have everything to lose and indigenous peoples everything to win. The rest of us, depending on our stand, have a transformed country to gain.

[Reprinted from the Guardian, October 21, 2014]

"Acting without public scrutiny, **prime minister Stephen Harper** is trying to shore up support for this policy – now 40 years old – to finally secure the elimination of indigenous land rights. The process is led by the same man, **Douglas Eyford**, who has been Harper's advisor on getting tar sands pipelines and energy projects built in western Canada"

Tsilhqot'in Nation Chiefs, June 26, 2014



Presentation to Mr. Douglas Eyford, Special Federal Representative Regarding Canada's Interim Comprehensive Claims Policy

October 30 , 2014, Montreal, Quebec

By Algonquins of Wolf Lake, Timiskaming, Eagle Village, Barriere Lake

Kwe kwe Mr. Eyford,

We are pleased to be here today and we welcome you. This presentation will try to cover a lot of ground in a short time. First we will explain who we are and a bit of our history as Algonquin people. Next, we will review recent events related to Aboriginal title and rights, and our efforts to have our rights addressed. We will also provide some initial comments on Canada's discussion paper regarding the Comprehensive Claims Policy (CCP). And finally, we will explain some of our expectations in terms of policy and process which should guide our future relations, and especially the reconciliation of the respective rights and interests of our peoples.

To begin, please be advised that today's meeting does not constitute meaningful consultation. Far from it. We have had little opportunity or time to prepare, or to review Canada's document. The federal government has provided us with no funds to carry out an analysis, consult our members, or to develop a formal position. As well, recent changes to the federal policy explicitly prohibit tribal councils from engaging in "***political advocacy***", but leave it up to bureaucrats to define what this means. The message from the federal government seems to be that we should be seen but not heard. As a result, we are not even able to use tribal council resources to support our presence here.

"We represent the Algonquins of Timiskaming, Wolf Lake, Eagle Village and Barriere Lake. Our communities are part of the Algonquin nation, whose traditional territory includes the entire Ottawa River watershed"

The federal paper invites "***informed discussion***" on policy renewal and expresses the hope that it will be a basis for "***respectful and constructive dialogue***". We welcome this, but if Canada is serious about consulting us on a renewed **CCP**, then it will need to provide adequate resources and adequate time, and also to recognize our right to organize and speak as we see fit on issues that affect us.

So for all of these reasons, we must tell you that this meeting is an information session only and without prejudice to our rights and interests. We do have some preliminary comments which we would like to share with you, and we look forward to authentic consultation in the near future if the government of Canada is prepared to be serious about engaging with us.

Who we are

We represent the **Algonquins of Timiskaming, Wolf Lake, Eagle Village and Barriere Lake**. Our communities are part of the Algonquin nation, whose traditional territory includes the entire Ottawa River watershed (see attachment 1: Map showing Algonquin nation territory circa 1850). As you can see from the map, Algonquin territory straddles what is now the provincial boundary between Ontario and Quebec. The imposition of this boundary has had a dramatic impact on our communities, one that continues to today.

At present, there are ten federally recognized Algonquin communities, with a total population of approximately 8-10,000. Nine of these Algonquin communities are located in Quebec. Proceeding from northwest to southeast, these are the Abitibiwinni, Timiskaming, Eagle Village (Kebaowek), Wolf Lake, Long Point (Winneway), Kitcisakik (Grand Lac), Lac Simon, Mitcikinabik Inik (Algonquins of Barriere Lake) and Kitigan Zibi (River Desert). In Ontario, members of the Algonquins of Pikwakanagan (at Golden Lake) make up the only recognized Algonquin community, though three other Ontario First Nation communities, Wahgoshig, Matachewan and Temagami, are of at least partially Algonquin descent. (See attachment 2: Map showing Aboriginal communities in the Ottawa River watershed.)

We live in a complex matrix of overlapping interests. The Ontario-Quebec border cuts through Algonquin territory; to the north in Quebec is the James Bay Northern Quebec Agreement territory; on the Ontario side our territories adjoin the territory of the Robinson Huron Treaty of 1850 and Treaty 9 of 1905-08. To the south the so-called "***Algonquins of Ontario***" comprehensive claim is at the **draft AIP stage** after more than 20 years of negotiations. To the north east the Attikamekw are in their fourth decade of **CCP** negotiations.

'Algonquins to Eyford' conclusion from page 6

And to the southeast are the Mohawk Councils at Kahnesatake, Kahnawake and Akwesasne.

Treaty of Niagara Wampum Belt 1764.

Barriere Lake, Wolf Lake, Timiskaming and Eagle Village are descended from the Algonquin Bands who traditionally used and occupied the territory where we still live. Our members can trace their ancestry and continued use and occupation of this territory back to time immemorial. Barriere Lake's traditional territory is wholly within the province of Quebec. Timiskaming, Eagle Village and Wolf Lake's traditional territories straddle the Ontario-Quebec border. Our language, customs and traditions are a big part of what defines us as a people. We have names, in our own language, for all of the lakes, rivers, mountains, and features of our respective territories. These names have been in use since time immemorial and they are proof of our long relationship with the land.

Our communities are all recognized as "***Bands***" within the meaning of the **Indian Act**, and come within the meaning of "***Indian peoples***" in section 35 of the **Constitution Act, 1982**. We have never entered into a land cession treaty surrendering our Aboriginal rights and title; nor have we authorized any other nation or entity to negotiate on our behalf for such title and rights. Therefore, our Aboriginal rights and title have never been extinguished and exist to this present day.

Aboriginal Title, Treaties and Alliance

Our ancestors were traditionally allied to the French and we played an important role in their struggle with the English because we controlled the Ottawa River, which was a strategic transport corridor between the St Lawrence and the upper Great Lakes. Beginning in 1760 the **Algonquins entered into a number of treaties with Great Britain**: at **Swegatchy** and **Kahnawake in 1760**, and at **Niagara in 1764**. They were not land surrender treaties: these agreements assured the British of our alliance, and in turn the British promised, among other things, to respect and protect our Aboriginal title and rights. In addition, the **Royal Proclamation of 1763** applies to our traditional territory: it guaranteed that our lands would be protected from encroachment, and that they would only be shared with settlers if and when we had provided our free and informed consent through treaty. Algonquin Chiefs were given copies of the **Royal Proclamation** by **Sir William Johnson** in 1763-64.

"Two hundred and fifty years after the Treaty of Niagara, our people are still waiting for a just settlement with Canada, while we continue to be excluded from equitable benefit of the economic and social life of our region"

Unfortunately, despite these commitments, the British Crown, and later the Canadian government, took our lands by force, without our consent, and without any compensation. Sixty years after the **Royal Proclamation of 1763** had been given to them, our Chiefs still had their original copies, which they presented to government along with petitions for protection of their lands and just compensation. Instead of dealing with them honestly, government ignored its commitments and continued to take the land without treaty and without consent. Our people suffered greatly as a result, even as those around them became rich from the furs, timber, minerals and other resources.

1812 Peace Medal of King George III.

Recent Events and Alternative Approaches

Two hundred and fifty years after the **Treaty of Niagara**, our people are still waiting for a just settlement with Canada, while we continue to be excluded from equitable benefit of the economic and social life of our region. Despite being surrounded by their own Aboriginal title lands, three out of the nine Algonquin communities in Quebec don't even have federal reserve lands of their own, while other communities do not have enough land to meet their growing housing needs.

Since the advent of section 35 of the **Constitution Act, 1982**, the contradictions have been mounting. Despite the fact that section 35 "***recognizes and affirms***" our Aboriginal and treaty rights, successive federal and provincial governments have produced a series of policy and negotiation frameworks which discount or ignore those rights, but which also require their extinguishment. In contrast, Canada's courts have issued a series of judge-

'Algonquins to Eyford' continued from page 7

Barriere Lake Chief Jean Maurice Matchewan arrested by SQ at a logging blockade in 1989.

"the Algonquins of Barriere Lake entered into a Trilateral Agreement with Canada and Quebec, with the shared objective of developing an integrated resource management plan that would protect their way of life while also enabling resource development to take place in a sustainable manner, but outside the CCP"

ments which serve to confirm and lay out the nature and scope of Aboriginal & treaty rights, and the tests required to prove them.

At the same time, the **United Nations Declaration on the Rights of Indigenous Peoples** has contributed to standard-setting with respect to Aboriginal rights and key principles such as free and informed consent.

Unfortunately, with each positive court decision or development on the international stage, the federal government seems to move it's policy further away, deeper into denial and avoidance. This was clear after the **Supreme Court of Canada** ruled in **Delgamuukw** in 1997. Following this decision, the federal government refused to amend the **CCP**, despite the fact that the policy and process were at odds with the legal reality described by the court. For your information we have included a legal opinion that was commissioned post-**Delgammukw**, which enumerates, in significant detail, the ways in which the **CCP** fails to conform to the law. (See attachment 3, **Mark Stevenson & Albert Peeling**, **Review of Canada's Comprehensive Land Claims Policy** (prepared for the Delgamuukw Strategic Implementation Committee, Assembly of First Nations. Released 15 February 2002.) We believe that the conclusions of this analysis still hold true.

With subsequent court decisions, in particular **Haida** and **Tsilhqot'in**, the disconnect between federal policy & practise on the one hand, and the law on the other, has become even more glaring. In particular, while the courts have acknowledged the need for policy and process that covers the spectrum from asserted rights through to final negotiated agreements, including the need to consult and accommodate in the interim, federal policy has failed to provide practical measures to address these realities.

Our communities have made a best effort at addressing these contradictions, and engaging the federal and provincial Crowns to ensure that our rights and interests are recognized and affirmed. These efforts provide some alternative approaches which, it seems to us, fall under the category of "***non-treaty agreements***" contained in the federal discussion paper. We would like to provide you with these examples.

Barriere Lake Trilateral Agreement

In the early 1990s, the **Algonquins of Barriere Lake** entered into a **Trilateral Agreement** with Canada and Quebec, with the shared objective of developing an integrated resource management plan that would protect their way of life while also enabling resource development to take place in a sustainable manner, but outside the **CCP**. Canada walked away from that agreement, partly because it took the position that the process was an effort to avoid the **CCP**. Today, the **Algonquins of Barriere Lake (ABL)** continue to pursue these objectives bilaterally with Quebec, but the federal government is absent. The **Trilateral Agreement Territory (TAT)** was recognized by Canada and Quebec, and encompasses, in general terms, the area over which **ABL** asserts Aboriginal title. (See Attachment 4, Map showing location of Grand Lac Victoria Beaver preserve, La Verendrye park and Trilateral Agreement territory (Arbex February 2007); and attachment 5, Map showing ABL Current Use and TAT (Arbex February 2007)).

Timiskaming, Wolf Lake & Eagle Village Statement of Asserted Rights

In January 2013, Timiskaming (TFN), Wolf Lake (WLFN) and Eagle Village (EVFN) presented Canada, Quebec and Ontario with a **Statement of Asserted Aboriginal Rights & Title (SAR)**, in part to address the gaps in federal policy related to consultation and interim measures prior to treaty negotiations. As explained in that document:

> The purpose of this Statement is to set-out the evidence to support WLFN, TFN and EVFN in their efforts to engage the honour of the Crown and its duty to consult them and accommodate their interests in matters affecting their traditional territo-

'Algonquins to Eyford' continued from page 8

> ries. It is intended to engage Canada's obligations under domestic law (**Constitution Act, 1982, s. 35** and the **Haida** case) and international law, the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**, which requires free prior and informed consent before any development activities within the traditional territories of Indigenous Peoples.
>
> This Statement is provided as an interim step prior to the completion of formal Statements of Claim from TFN, WLFN and EVFN, and is provided at this time to give the Crown formal notice of their asserted Aboriginal rights and title. [...] Although this Statement is only a summary of the evidence, it is intended to provide enough evidence to trigger the Crown's duty and to establish that the scope of that duty is at the high end because of the strength of the claim.1

The package that went with the SAR included extensive documentary evidence to substantiate the assertions made. It also included a map showing the geographic extent of the area over which the three communities assert Aboriginal title and rights (see attachment 6, Timiskaming, Wolf Lake and Eagle Village: Asserted Aboriginal Rights area (January 2013).

Canada has been unprepared to address the **SAR** in any meaningful way. It has refused to engage the communities substantively with respect to consultation, and instead has insisted that the only way for these matters to be addressed is for Eagle Village, Wolf Lake and Timiskaming submit their comprehensive claims to Canada for review; but that even then, nothing will be done until all of the nine '***Quebec Algonquin***' communities submit claims. Canada has refused to act on the strength of evidence provided to it in the SAR. 1 Statement of Asserted Aboriginal Rights & Title: Timiskaming, Wolf Lake & Eagle Village, Jan 2013: p. 2

Although, as we will see below, the federal discussion paper identifies the "***negotiation of non-treaty options***" as a possibility, and suggests that "***non-treaty approaches can be an effective way to address Section 35 Aboriginal rights***", we have not seen any indication that federal officials are actually prepared to entertain these alternatives. In fact, Barriere Lake's experience with the **Trilateral Agreement** and the experience of Timiskaming, Wolf Lake and Eagle Village with the **SAR**, suggests that federal officials are unwilling to consider practical alternatives to the **CCP**, even when confronted with significant strength of evidence.

Comments on the Federal Discussion Paper

Over the last decades, we have, through the **Algonquin Nation Secretariat**, participated in more than one effort to have the **CCP** revised. Each time we have seen the federal government avoid the fundamental change that is needed to ensure that the **CCP** conforms to domestic law and international standards. Instead, Canada has opted to maintain the status quo, which is based on the extinguishment of our rights and the continued poverty of our people.

Given this history, it should come as no surprise that we may be sceptical of current federal offers to renew and reform the **CCP**. The federal government seems content to tinker with the process, but appears unwilling to fundamentally change its policy to catch up to the law and international standards. Regardless, we are here today to make our representations to you in the hope that perhaps this time might be different. And if not, then our views will be on the record, and we will join previous leaders of our nation who have consistently asked the Crown to do the right thing.

We have received a copy of a federal discussion paper entitled "***Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights***", dated September 2014. We understand that today's meeting with federal representatives is to enable us to hear more about this interim policy, and to provide our initial comments.

We can tell you that the members of Timiskaming, Barriere Lake and Wolf Lake, meeting in

"Barriere Lake's experience with the Trilateral Agreement and the experience of Timiskaming, Wolf Lake and Eagle Village with the SAR, suggests that federal officials are unwilling to consider practical alternatives to the CCP, even when confronted with significant strength of evidence"

BC AFN Regional Chief Jody Wilson-Raybould excluded non-negotiating First Nations from the Canada-AFN CCP SOC Process.

"these principles were never ratified by the Chiefs in Assembly or the AFN Chiefs CCP Working Group. So we do not believe that it is appropriate to point to those principles as being representative of First Nation views, or to suggest that the outcomes of the Senior Oversight Committee on Comprehensive Claims were reflective of authentic joint development"

PM-AFN Meeting on Jan. 11, 2013, where Harper agreed to CCP SOC Process.

'Algonquins to Eyford' continued from page 9

assembly on September 17, 2014, rejected this interim policy (see attachment 7, ANS Resolution 2014-07). We can also tell you that the **Assembly of First Nations of Quebec and Labrador** has rejected this document.

In this connection we need to mention of the "***Principles Respecting the Recognition and Reconciliation of Section 35 Rights***" which is referred to in Canada's discussion paper, and which is described as being "***jointly developed by the Crown and First Nation leaders, with the support of the Assembly of First Nations, through the Senior Oversight Committee on Comprehensive Claims***". Despite our best efforts, we were excluded from participation in that process and therefore those principles do not reflect our views or our realities. Our communities are not alone in this situation. Moreover, these principles were never ratified by the **Chiefs in Assembly** or the **AFN Chiefs CCP Working Group**. So we do not believe that it is appropriate to point to those principles as being representative of First Nation views, or to suggest that the outcomes of the **Senior Oversight Committee on Comprehensive Claims** were reflective of authentic joint development.

We must emphasize to you is that if Canada is serious about consulting on the **CCP** then it needs to engage directly with the rights-holders. Organizations like the **Assembly of First Nations** are not equipped or mandated to address matters arising from our rights and title.

The federal discussion paper on renewing the **CCP** does not appear to represent any departure from the status quo, or to provide any substantive response to the significant changes to the legal landscape brought about by **Delgamuukw**, **Haida**, or **Tsilhqot'in**. Rather, it reflects the same failed policy approach that has mitigated against successful reconciliation between our peoples up to now.

Following are some preliminary comments under specific headings:

Certainty

Nothing new here, but continued emphasis on legal "***techniques***" to obtain effective extinguishment, without meaningful recognition or affirmation of rights.

Lands

Although it is not stated in the discussion paper, we understand that Canada refuses to provide Reserve lands within the meaning of Section 91(24) of the **BNA Act, 1867** as part of a treaty agreement. If this is the case it should be stated clearly, and if not, then it should be explicit about the retention of 91(24) lands.

Shared Territories and Overlapping Claims

Our communities have spent considerable time and effort to document their territorial interests, as well as potential overlaps with neighbouring communities. Canada has so far refused to engage us seriously on this issue despite our best efforts, and in fact continues to negotiate with the "***Algonquins of Ontario***" (**AOO**) over lands that we use and occupy, and over which we have asserted Aboriginal title. We are currently engaged in protracted discussions with federal officials to try and obtain a substantive consultation process to address our concerns about the impact of the **AOO** claim on the asserted rights of Timiskaming, Eagle Village and Wolf Lake. We continue to meet resistance.

Trans-Boundary Claims

After many years of explaining who we are, and despite the facts, we are still confronted by a federal government that insists we are '***Quebec Algonquins***'. Federal infatuation with the **AOO claim** at the expense of considering the interests of other adjacent Algonquin communities is an example of this. The federal approach is contrary to reality. Substantial portions of Timiskaming, Wolf Lake and Eagle Village traditional territory lie in both On-

'Algonquins to Eyford' continued from page 10

tario and Quebec. Our members go to school, hunt, fish, work, and live in both provinces. Canada needs to recognize this reality and support our efforts to resolve issues arising from the imposition of the provincial border on our traditional territories.

AANDC Headquarters

Loan Funding

The discussion paper is silent on the matter of loan funding other than to say that outstanding loans must be paid, but we understand it remains the policy of Canada that it will only enter into negotiations on the basis of loans. Experience has shown that gives unfair advantage to Canada as negotiations drag on and First Nations become mired in debt through no fault of their own. If loan funding is no longer Canada's policy, then it should be stated in this discussion paper.

Federal Jurisdiction

We understand that Canada requires treaty beneficiaries to give up the federal character of their core lands, and we ask why this is part of the price our communities are asked to pay for resolving the land question.

Silence on Key Irritants

Overall, it seems that in drafting the federal discussion paper, a decision was made to avoid explicit mention of the some of the most objectionable aspects of the policy. Some examples include (and there others as well):

"Overall, it seems that in drafting the federal discussion paper, a decision was made to avoid explicit mention of the some of the most objectionable aspects of the policy"

- **taxation**
- **loss of reserve lands & reduction of s. 91(24) federal responsibility**
- **no compensation for prior infringement**
- **loan funding**

Given the contention surrounding these aspects of current policy and practise, and the need for frank discussion, we find this avoidance to be troubling. If the government of Canada wants a forthright dialogue, then it should be explicit about whether these significant barriers to reconciliation remain part of the **CCP**, or whether there is an opportunity to discuss alternative approaches.

Beneficiaries

We are very concerned at the federal approach to beneficiaries in the **AOO claim**, which gives standing to individuals and groups who may not meet the legal requirements as title holders. As a result we may find that non-title holders are provided with an opportunity to extinguish Algonquin title and rights to territory over which we assert Aboriginal title. Despite the fact that we have advised Canada of our concerns, and provided the federal government with a clear indication of the territory over which we assert title and rights, as well as the overlaps with the **AOO claim**, we have received no substantive response or engagement on this matter.

Colleen Swords, DM of AANDC.

Compensation

The **Delgamuukw** decision speaks about the requirement for compensation when lands and resources have been taken without consent or justification. Despite this direction from the courts, Canada's **CCP** continues to avoid the matter of compensation. For Algonquin territory, where the minerals and timber have been largely taken out already, this is a significant issue.

Aggregation of Aboriginal Groups

Experience shows that the federal government is arbitrary when it comes time to decide

'Algonquins to Eyford' conclusion from page 11

who to deal with in negotiations. For instance, Canada is negotiating the **AOO claim** solely with the **Algonquins of Pikwakanagan** and an assortment of non-status groups. Canada has so far refused to engage **Timiskaming**, **Wolf Lake** and **Eagle Village** with respect to our asserted interests in the **AOO territory**. At the same time, in **BC** there are many negotiations taking place with individual First Nations/Bands.

On the other hand, when Timiskaming, Eagle Village and Wolf Lake transmitted the **SAR** to Canada, the federal response was that we were not a large enough aggregate, even though our communities are contiguous and we share close common history and kinship.

Federal officials have refused to act on evidence presented in the **SAR** which demonstrates that within the **Algonquin nation Aboriginal title is held at the band/community level**, or its application to our assertion of rights. We were told: submit your claim, wait until the other six '***Quebec Algonquin***' communities submit their claims, and, whenever that happens, Canada will then decide how it will approach the claim globally with all of the '***Quebec Algonquins***'. But federal officials have been unable or unwilling to offer any substantive interim measures that would address our assertion of rights in the meantime.

There may be some issues (for instance **membership / beneficiaries**) which are appropriate to discuss at aggregate levels, but what those aggregate levels should be needs to be informed by the customs and traditions of the nation, and be accountable to the rights-holders. It is not appropriate for the federal government to interfere in our internal affairs and dictate these matters. Canada will need to show flexibility on this issue if it is to be successful in negotiations.

Reconciliation measures outside of the treaty process/Negotiation of Non-Treaty agreements

This approach provides some interesting possibilities and deserves further exploration, particularly on an interim basis until such time as the broader issues of **CCP reform** are dealt with. But, as explained above, we do not see any willingness on Canada's part to actually support this type of effort in our territory. If Canada is truly serious about reconciliation measures outside of a treaty process, then it can start by engaging with our communities on the **SAR** and the **Trilateral Agreement**.

We continue to be troubled by the fact that Canada refuses to adequately address the rights and interests of our communities in connection with consultation. For example, recently **Timiskaming**, **Eagle Village** and **Wolf Lake** have been dealing with the **Department of Public Works and Government Services Canada** with respect to the refurbishment of the dams at **Temiscaming** and **Latchford**, but that federal department steadfastly refuses to engage in meaningful consultation by refusing to address Aboriginal rights and title on the affected lands as a central issue.

Until the **CCP** is amended to recognize and affirm our rights in a way that provides equitable, ongoing benefit and protection to our people and our lands, there will be a continuing need for meaningful and effective interim reconciliation measures. We look forward to have a chance to pursue these alternatives with Canada, as well as longer term solutions, if Canada demonstrates the will. The status quo is not tenable.

Megwetch,

Chief Harry St Denis, Wolf Lake
Chief Terence McBride, Timiskaming
Chief Madeleine Paul, Eagle Village
Chief Casey Ratt, Barriere Lake

Attachments

1. Map showing Algonquin nation territory circa 1850 (prepared by PlanLab for the Algonquin Nation Secretariat, 14 February 2012)
2. Map showing Aboriginal communities in the Ottawa River watershed (prepared by PlanLab for the Algonquin Nation Secretariat, March 2014)
3. Mark Stevenson & Albert Peeling, *Review of Canada's Comprehensive Land Claims Policy* (prepared for the Delgamuukw Strategic Implementation Committee, Assembly of First Nations. Released 15 February 2002.)
4. Map showing location of Grand Lac Victoria Beaver preserve, La Verendrye Park and Trilateral Agreement Territory (Arbex February 2007)
5. Map showing ABL Current Use and TAT (Arbex February 2007)
6. Timiskaming, Wolf Lake and Eagle Village: Asserted Aboriginal Rights area (January 2013)
7. ANS AGA resolution 2014-7 re: federal interim CCP.

Canada's Interim Comprehensive Claims Policy: Same Old, Same Old

Posted September 24, 2014 by Mandell, Pinder, LLP

The **1986 Federal Comprehensive Land Claims Policy** was last updated in 1993, before most of the significant judicial decisions on **s. 35** of the **Constitution Act, 1982**. One might have expected, given the timing of the federal government's release of its **interim Comprehensive Land Claims Policy**, entitled **Renewing the Comprehensive Lands Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights** (September 2014) (the "***Interim Policy***"), that this policy would be responsive to the **Supreme Court of Canada's** decision in **Tsilhqot'in**, and would include a commitment to new mandates reflective of the rights and roles of Indigenous peoples and governments in the Canadian federation.

HOW THE INTERIM POLICY COMPARES TO *TSILHQOT'IN*

A review of the **Interim Policy** reveals that it is not based on recognition of the extent and content of Indigenous Peoples' Aboriginal title as clarified by **Tsilhqot'in**, or of Indigenous peoples' governance rights. Further, Canada continues to seek certainty largely through a **de facto** extinguishment of Aboriginal title and rights, rather than to seek co-existence based on recognition of Indigenous governance and title and reconciliation.

Following **Tsilhqot'in**, it is clear that the Crown's rights to lands and resources in British Columbia and other areas of the country where Aboriginal title remains unextinguished are quite limited. While the courts have distinguished between the "**pre-proof**" and "**post-proof**" stage, the reality is that most if not all Indigenous peoples could prove Aboriginal title to their territories, and certainly to areas larger than those that have been set aside as "***settlement lands***" under **modern treaties**. Treaties are meant to be an alternative to title litigation, and to be effective in that regard it is time for the Crown to recognize this reality and negotiate treaties on this basis.

The key elements and principles of the **Interim Policy**, which set out the federal government's current position, are as follows:

- Treaties achieve certainty by setting out "***precise***" rights. Certainty is central to the purpose of treaty negotiations. While not framed in terms of "***extinguishment***", Aboriginal rights "***continue***" in the abstract; they generally will not be exercisable. Instead, treaties will clearly identify the geographic area where treaty rights are exercisable, and clearly define the terms by which treaty beneficiaries have access to wildlife resources. Crown laws in relation to hunting, fishing and trapping will apply.

- The **Interim Policy** provides that Indigenous peoples who sign treaties will have secure title to treaty settlement lands, and will be able to fully realize the economic potential of such lands. This suggests that outside of settlement lands, Indigenous peoples might be excluded from the economic benefits. If current formulas for determining how much land the Crown is willing to agree to as settlement lands continue, much of the economic rights held by Indigenous peoples to their lands and resources would be expropriated through treaty.

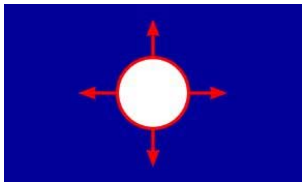
"If current formulas for determining how much land the Crown is willing to agree to as settlement lands continue, much of the economic rights held by Indigenous peoples to their lands and resources would be expropriated through treaty"

- Self-government provisions will set out Indigenous governments' jurisdiction over treaty settlement lands and their citizens and provide clarity with respect to the application of Aboriginal and Crown laws on the settlement lands. There is no provision for the operation of Indigenous laws outside of settlement lands.

- Treaty signatories may have the subsurface rights on some treaty settlement lands and some Crown lands.

Canada is prepared to negotiate resource revenue sharing with respect to natural resources over which the federal government has responsibility, but the **Interim Policy** is

'Same Old Same Old' conclusion from page 13



based on the premise that it is the Crown who has the right (in the absence of treaty) to derive such revenues. Canada would negotiate providing a share of federal royalties in settlement areas. Further, capital transfer amounts may be reduced in accordance with arrangements concerning resource revenue sharing, and resource revenues will be subject to taxation.

This is not a shift in policy. These are the same essential principles that the Crown has applied to treaty negotiations based on its now rejected "***small spots***" theory and position that it has a beneficial interest in Aboriginal title lands and the right to manage those lands to the exclusion of Indigenous peoples and their laws.

"This is not a shift in policy. These are the same essential principles that the Crown has applied to treaty negotiations based on its now rejected "small spots" theory and position that it has a beneficial interest in Aboriginal title lands and the right to manage those lands to the exclusion of Indigenous peoples and their laws"

GOING FORWARD

According to the **Interim Policy**, Canada will contemplate forms of agreements other than comprehensive treaties or agreements in areas of federal jurisdiction (e.g., non-treaty arrangements, contracts, legislation, memoranda of understanding and consultation and accommodation processes). **Comprehensive treaty negotiations** in British Columbia will proceed under the **British Columbia Treaty Process**. The honour of the Crown demands that the Crown (federal and provincial) be open to alternative paths towards reconciliation that create space for the operation of Indigenous governance over land and resources and fully and honestly recognize and reconcile Indigenous peoples' interests in the lands and resources with the interests of the Crown and Canadians in general. **British Columbia** has thus far not indicated whether it will be revisiting its policies with respect to treaty negotiation post-**Tsilhqot'in**. For example, will the Crown provide for more extensive settlement lands to reflect the fact that without treaty, the Crown does not have the beneficial interest to, and thus the right to benefit from, much of British Columbia? Is there any willingness on the Crown's part to negotiate in good faith the co-existence of legal systems and laws? Will the Crown provide compensation for past damages and infringements?

CHANGE IS OVERDUE

Canada has stated that the **Interim Policy** is a starting point for dialogue and the basis on which it will seek input from Indigenous peoples, stakeholders and interested parties, over the Fall of 2014. **Ministerial Special Representative Douglas Eyford** is tasked with engaging with First Nations over the Fall. Given the gap between the **Interim Policy** and the law, more time may be necessary for this process. In order for there to be a real incentive for Indigenous peoples to engage in land claim negotiations with the Crown, Crown mandates will need to shift. Now is the time for Canada (and British Columbia) to adopt a policy grounded in **Tsilhqot'in** and the **United Nations Declaration on the Rights of Indigenous Peoples**.

Tsilhqot'in Chief Roger William in front of Supreme Court of Canada building.

Invader-States Hijacked UN World Conference on Indigenous Peoples

By Glenn Morris, October 16, 2014

While watching the fraudulently-labeled **United Nations World Conference on Indigenous Peoples (HLPM/WCIP)**[1] on UN WebTV on September 22-23, I was reminded of the famous quote from Thomas Pynchon: "***If they get you asking the wrong questions, they don't have to worry about the answers***." The **UN** meeting was full of state members who had convinced a fair number of indigenous attendees to ask a multitude of the wrong questions. Unfortunately, whatever questions the indigenous people asked, the answer was always the same: the forces that invaded our homelands are firmly in charge at the **UN**.

Worse yet, the room at the **UN** contained indigenous people who attended the meeting from a position of fear, not from the courageous stance that defined the birth of the contemporary international movement for indigenous peoples' rights forty years ago. The indigenous spectators seemed to be attending because of insecurity that they were going to be left out[2] of something big. They weren't sure what, but they weren't going to miss it. They refused to assert their most fundamental rights, for fear of irritating the **UN** members -- the very states that invaded our territories, slaughtered our people, and attempted to exterminate our cultures. It was sorry spectacle, indeed.

The meeting proved to be a predictable success for invader-states of the **United Nations**. It also marked a retreat from the forty years of international struggle towards indigenous peoples' self-determination that took hold after the 71-day liberation of Wounded Knee in 1973. What most indigenous people around the world did not know about the **HLPM/WCIP** was that, ridiculously, the final conclusions, or as they called it the "***Outcome Document***" (**OD**), of the **WCIP** had already been completed by the states -- before the conference ever began. The meeting was a charade, with the outcome pre-determined. There was no need for any discussion, let alone debate. In fact, there was no need for the meeting, at all – except as an example of self-serving kabuki theatre[3], to allow states to perpetrate the fraud that they care anything about indigenous peoples.

The meeting was a retreat for indigenous peoples because the international indigenous peoples' movement over the past forty years has been influenced largely through four essential, strategic priorities. These four positions were consciously excluded, or were rendered meaningless, in the final **Outcome Document (OD)**[4] of the meeting:

1. Self-Determination. The right of self-determination for indigenous peoples, that is, the *international* legal right of indigenous nations freely to determine our political status and freely to pursue our economic, social and cultural development, is a hallmark of the **UN Declaration on the Rights of Indigenous Peoples**[5] (**UNDRIP**) (Article3). Self-determination is mentioned **nowhere** in the **OD**.

2. The international personality of indigenous nations, and the international character of treaties between indigenous nations and invader states. This principle is an extension of self-determination – and insists that indigenous peoples are not conquered nations and are not rightfully under the domination of, or occupation by, invader states. Similarly, the principle asserts that treaties between indigenous peoples and invaders must be accorded international respect and be subject to impartial, international arbitration, as alluded to in **Article 37** of the **UNDRIP**. There is no mention, whatsoever, of treaties between indigenous nations and states in the **OD**.

3. The right of Indigenous peoples to control our territories, natural resources and traditional knowledge. There are no guarantees in the **OD** to secure the **free, prior and informed consent (FPIC)** of indigenous peoples prior to state or corporate invasions of indigenous peoples' territories. There is no mention of state's commitment to enforcing **FPIC**. On the last day of the conference **Canada** explicitly stated that it would not support **FPIC** because **Canada** refuses to relinquish its presumed supremacy over indigenous nations. **Canada's colonial arrogance** was not unique; **Canada** simply admitted it with the greatest blatancy.[6] References to **FPIC** in the **OD** are gratuitous, having been rendered sterile by state pillaging of the substantive meaning of **FPIC**.

Tadodaho Sid Hill, Chief of the Onondaga Nation, delivers the ceremonial welcome to participants at the opening of the high-level plenary meeting of the General Assembly fraudulently known as the World Conference on Indigenous Peoples.

"The meeting proved to be a predictable success for invader-states of the United Nations. It also marked a retreat from the forty years of international struggle towards indigenous peoples' self-determination that took hold after the 71-day liberation of Wounded Knee in 1973"

'Hijacked Conference' continued from page 15

Cree Grand Chief Matthew Coon Come attended the UN HLP.

"Certain UN members, (and the UN bureaucracy itself, which operates first and foremost to protect state interests) were masterful in establishing indigenous gatekeepers within the UN system, and in privileging those who were in favor of the HLPM/WCIP as the "good/ reasonable Indians," while marginalizing those who had criticisms of it as the "bad/hostile Indians"

FSIN Chief Perry Bellegarde attended the UN HLP.

4. Dismantling the Doctrine of Christian Discovery. The legal bedrock upon which the U.S., Canada, and most other settler states rationalize their invasion, domination and destruction of indigenous peoples. This legal doctrine, the foundation for all US federal Indian law, legitimizes Christian, white supremacy and the theft of entire continents. The ongoing legitimacy of the doctrine in settler-state law violates the **UN Charter**, **both UN human rights covenants**, and the **Conventional for the Elimination of Racial Discrimination**. Yet, the "***World Conference***" **OD** ignored the issue entirely, and left the **Doctrine of Discovery** completely unexamined, and intact.

States can make no pretense of forthright implementation of the **UNDRIP** while ignoring each of these four essential areas. Similarly, the indigenous people in the meeting can hardly claim the mantle of "***leadership***" after volunteering as props in a sham process, while allowing states to declare the meeting a success. The **HLPM** certainly proved to be a success for states - in their expanding domination and domestication of indigenous peoples. The "***world conference***" process permitted states to evade all accountability for their crimes against humanity, for genocide, and for their persistent, ongoing destruction of indigenous peoples, in the name of civilized progress, development, and globalization.

The state-controlled **HLPM/WCIP** process utilized three time-honored tactics against indigenous peoples, in achieving the deception of effective indigenous participation and consent in its ersatz "**world conference**":

1. Divide and conquer

2. Exclusion of the opposition, and

3. Ingratiation.

Certain **UN** members, (and the **UN** bureaucracy itself, which operates first and foremost to protect state interests) were masterful in establishing indigenous gatekeepers within the **UN** system, and in privileging those who were in favor of the **HLPM/WCIP** as the "***good/ reasonable Indians***," while marginalizing those who had criticisms of it as the "***bad/hostile Indians***." By legitimizing the indigenous gatekeepers, the **UN** provided a level of insulation between the state parties who wanted the appearance of indigenous peoples' buy-in to the **HLPM/WCIP**, and those indigenous peoples who rejected state manipulation, who demanded respect and equal participation, and who refused to lend their consent to a counterfeit "***world conference***".

As it became clear that the indigenous gatekeepers could not achieve a global consensus for indigenous peoples' collaboration in the **HLPM plan**, the **UN** simply began to exclude and silence the opposition. When the **North American Indigenous Peoples' Caucus (NAIPC)** decided that it was not going to accept subordination and inequality in the "***world conference***" design, **NAIPC** representatives (both adult and youth) were systematically excluded from any debates or decisions regarding the meeting. The **UN** surreptitiously began to marginalize "***bad Indians***" and empower "***pragmatic Indians***," who agreed to comply with the **world conference program**. The "***reasonable Indians***", like the representatives from the **Indian Law Resource Center (ILRC)**, the **Native American Rights Fund (NARF)**, the **National Congress of American Indians (NCAI)**, and the **International Indian Treaty Council (IITC)** were validated by being allowed to remain in the **UN communications loop**; they were rewarded with information, access, and sometimes even funding, to facilitate their continued participation. This tactic took the form of explicitly denying funding to opposition delegates, while funding supportive ones, leading to the censoring of oppositional voices in planning meetings for the **WCIP**. Delegates critical of the **WCIP** were denied credentials, silencing their voices in the **HLPM/WCIP**. The states' strategy was to provide the deception of indigenous consensus by excluding those who might have blocked consensus through the expression of critical or contrary perspectives.

The third tactic, ingratiation, was used flagrantly by certain indigenous delegates from the **US** and **Canada** to circumvent the **NAIPC** "***bad/hostile Indians***", and to solicit the **US** and **Canadian** governments. In the **US**, the **ILRC**, **NARF**, **NCAI**, and **IITC** met and/or commu-

'Hijacked Conference' continued from page 16

nicated directly with the **US State Department representatives** a number of times prior to the **WCIP**. In an apparent ***quid pro quo*** for the **U.S. indigenous NGOs** agreeing to follow the game plan at the **HLPM**, the **US** government tossed them a few crumbs. The crumbs came in the form of cosmetic support for uncontroversial postures from the **NGOs** that in no way challenged the supremacy of **US plenary power in domestic Indian law and policy**. The "***good Indian***" organizations will, of course, reject these characterizations, but the record speaks for itself. They allowed themselves, and cajoled several "***tribal government***" reps, to be exploited as extras in the states' kabuki theatre. For their trouble, they came away from the meeting with absolutely nothing of substance.

One specific reflection of these cozy relations can be found in **US representative Keith Harper's** presentation to the **WCIP** on September 23.[7] **Harper**, a Cherokee but speaking for the **United States government**, was named this year by **Obama** to be the **US ambassador to the UN Human Rights Council**. The number of similarities between **Harper's address**, and the positions being circulated by the **ILRC/NARF/NCAI alliance** defies coincidence. Certainly, the "***pragmatic Indians***" are jubilant that **Harper** mentioned the **US'** consideration of ***the possibility* of a place for Indian "tribal governments" *somewhere, sometime* in the UN system**. The "***reasonable Indians***" (just like those "***good Indians***" of previous eras) would be well advised not to hold their breath for the **U.S.'** artifice to be realized, any more than the thousands of other promises that litter the historical relationship between the **US** and indigenous nations.

In the debates over the past two years, about whether **NAIPC** should withdraw from the **HLPM/WCIP**, a defense of participation from **North America** was offered, based on the premise that it was important for indigenous peoples to participate in the **HLPM/WCIP** because, "***if you're not at the table, then you're probably on the menu***." In other words, to protect the gains of the past forty years, we must continue to participate in the **UN process** even, apparently, under conditions that might be disrespectful, unequal and destructive.

While watching the **HLPM** on the **UN webcast**, I thought of those debates and of the "***menu***" slogan. Another culinary paraphrase came to mind, this time from the great **Uruguayan author Eduardo Galeano**: "***your participation in this process allows you only to suggest the sauce with which you will be eaten***." Unfortunately, the most that came out of this **UN meeting for indigenous peoples** was, as **Galeano** cautioned, the "***opportunity***" for indigenous peoples to participate in a process that allows us only to suggest the sauce with which we will be eaten by the invader states and corporations. We have been warned.

ENDNOTES:

1. Although the use of the word fraud might seem hyperbolic and divisive, it is, in my view, more accurate than a term such as pretension. Fraud describes an intentional deception with the goal of depriving people of their property or their rights. Some well-meaning or naive people were drawn into this process, and I do not mean to impute bad motives to them. Other indigenous gatekeepers in the UN system clearly understood what was happening and freely participated in it, fabricating rationalizations and excuses, at every turn. It is clear that some invader states advanced the WCIP to continue the state/corporate theft of indigenous peoples' territories and to deprive indigenous peoples of fundamental rights under international law, as discussed below. Ultimately, the goal of these states was to use the WCIP to reduce and incorporate the Declaration on the Rights of Indigenous Peoples into domestic law, imprisoning indigenous peoples in the legal semantics of invader states. This fraud began with the imposition of the official title of the meeting, "A High Level Plenary Meeting (HLPM), to be known as The World Conference on Indigenous Peoples." Anyone familiar with the UN system knows that a HLPM is not synonymous with a World Conference. An authentic world conference is 10-14 days long, with thousands of participants, speakers, rallies, scholarly discussions, and with a final global plan of action to advance the goals of the conference. Examples of genuine world conferences are the World Conference on Women in Beijing in 1995, and the World Conference Against Racism in Durban, South Africa in 2001. This meeting in no way resembled a genuine world conference. It was analogous to one proclaiming, "This is my Prius, to be known as a Ferrari," with the irrational expectation that the world should, in fact, acknowledge your Prius as a Ferrari. The fraudulent design of the plan was so clear to many indigenous people in North America, that the North American Indigenous Peoples' Caucus called for the cancellation of the meeting, altogether, and refused to participate in it; see: http://indiancountrytodaymedianetwork.com/2014/03/12/naipc-says-un-indigenous-conference-insults-indigenous-peoples-153946

2. This is a variation of the social anxiety disorder known as Fear Of Missing Out (FOMO). FOMO is a form of neurosis though which a person is compulsively concerned that s/he might miss an opportunity for social interaction, personal recognition, profitable investment or other satisfying event. One problematic with the indigenous FOMO crowd attending the HLPM was that because they never intended to confront or to challenge the racist, structural domination of

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Oren Lyons, Onondaga Faithkeeper attended the UN HLP.

states over indigenous peoples, their very presence at the WCIP provided the appearance of consent to the states' design to diminish the rights of all indigenous peoples. At the same time, the FOMOs provided cover for the states that acknowledged the indigenous FOMOs in the room, and crowed that indigenous peoples had been consulted, and had provided "comprehensive engagement" in the sham meeting. The states projected the FOMO participants as proxies for all indigenous peoples around the world. See paragraph 2 of the Outcome Document for the High Level Plenary meeting, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/L.1

3. As a political metaphor, kabuki theatre is used here to describe actions that are an artifice, insincere, and something done for show, an act that pays only lip service to the stated goal.

4. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/L.1

5. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

6. http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx

7. http://webtv.un.org/search/united-nations-system-action-to-implement-the-rights-of-indigenous-peoples-world-conference-on-indigenous-peoples-roundtable-1/3801114935001?term=World%20Conference%20on%20Indigenous%20Peoples Harper's comments begin at 2:06:00 on the UN Web TV video.

"As a political metaphor, kabuki theatre is used here to describe actions that are an artifice, insincere, and something done for show, an act that pays only lip service to the stated goal"

Glenn Morris (Shawnee) is a member/spokesperson for the Leadership Council of the American Indian Movement of Colorado. He is a professor of political science at the University of Colorado at Denver, where he directs the 4th World Center for the Study of Indigenous Law and Politics. He has been active in the defense of Native nations at the United Nations since 1981.

[Reprinted from http://indiancountrytodaymedianetwork.com/2014/10/16/invader-states-hijacked-un-world-conference-indigenous-peoples]

Global Coordinating Committee of the UN HLP.

Opening of the UN High Level Plenary Fraudulently called the World Conference on Indigenous Peoples.

Tsilhqot'in Nation v. British Columbia 2014 SCC 44 – Case Summary—Posted June 27, 2014

In a watershed decision released today, the Supreme Court of Canada ("SCC") allowed the Tsilhqot'in Nation's appeal and, for the first time in Canadian history, granted a declaration of Aboriginal title. In doing so, the Court confirmed that the doctrine of terra nullius (that no one owned the land prior to Europeans asserting sovereignty) has never applied to Canada, affirmed the territorial nature of Aboriginal title, and rejected the legal test advanced by Canada and the provinces based on "small spots" or site-specific occupation. The SCC overturned the Court of Appeal's prior ruling that proof of Aboriginal title requires intensive use of definite tracts of land and it also granted a declaration that British Columbia breached its duty to consult the Tsilhqot'in with regard to its forestry authorizations. This case significantly alters the legal landscape in Canada relating to land and resource entitlements and their governance.

The SCC definitively concluded that the trial judge was correct in finding that the Tsilhqot'in had established title to 1,750 square kilometres of land, located approximately 100 kilometres southwest of Williams Lake. The Court reaffirmed and clarified the test it had previously established in Delgamuukw for proof of Aboriginal title, underscoring that the three criteria of occupation: sufficiency, continuity (where present occupation is relied upon), and exclusivity were established by the evidence in this case.

SUFFICIENT AND EXCLUSIVE OCCUPATION

The SCC reasoned that Aboriginal title was not limited to village sites but also extends to lands that are used for hunting, fishing, trapping, foraging and other cultural purposes or practices. Aboriginal title may also extend "beyond physically occupied sites, to surrounding lands over which a Nation has effective control." The SCC endorsed further examples of Aboriginal occupation sufficient to ground title including "warning off trespassers," "cutting trees," "fishing in tracts of water" and "perambulation."

Further, the SCC affirmed the importance not only of the common law perspective but also of the Aboriginal perspective on title including Aboriginal laws, practices, customs and traditions relating to indigenous land tenure and use. The principle of occupation, reasoned the SCC, "must also reflect the way of life of Aboriginal people, including those who were nomadic or semi-nomadic."

The SCC reasoned that the criterion of exclusivity may be established by proof of keeping others out, requiring permission for access to the land, the existence of trespass laws, treaties made with other Aboriginal groups, or even a lack of challenges to occupancy showing the Nation's intention and capacity to control its lands.

WHAT RIGHTS DOES ABORIGINAL TITLE CONFER?

The Court reasoned that Aboriginal title holders have the "right to the benefits associated with the land – to use it, enjoy it and profit from its economic development" such that "the Crown does not retain a beneficial interest in Aboriginal title land." Expanding on its reasons in Delgamuukw, the SCC concluded Aboriginal title confers possession and ownership rights including:

- the right to decide how the land will be used;
- the right to the economic benefits of the land; and
- the right to pro-actively use and manage the land.

These are "not merely rights of first refusal." Indeed, the Court recommended that "governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."

The SCC also reasoned that "the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders." If consent is not provided, the "government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982."

JUSTIFICATION ANALYSIS

The Court clarified the justification analysis it set out in Sparrow, Gladstone and Delgamuukw. The Court reasoned that the Crown's burden of demonstrating a "compelling and substantial" legislative objective must be considered from the Aboriginal perspective as well as from the perspective of the broader public in a manner that furthers the goal of reconciliation between the Crown and Aboriginal peoples. Further, the Crown must also "go on to show that the proposed incursion on Aboriginal title is consistent with the Crown's fiduciary duty towards Aboriginal people." The SCC reasoned that the Crown's fiduciary duty means that: (1) incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land; and (2) the fiduciary duty infuses an obligation of proportionality into the justification process that is inherent in the reconciliation process. Implicit in the Crown's fiduciary duty is the requirement that the infringement be necessary to achieve the government's goal that the benefits not be outweighed by the adverse effects on the Aboriginal interest, and that the government go no further than necessary to achieve its goal.

The SCC warned that if governments do not meet their obligations to justify infringements to Aboriginal title, and do not act consistent with their fiduciary duties, project approvals may be unraveled, and legislation may fall. The message is that governments that don't justify their actions act at their peril. The Court offered the following example:

If the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent it unjustifiably infringes Abo-

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riginal title.

IMPACTS OF PROVINCIAL LEGISLATION

In light of its declaration of Aboriginal title, and based on the Forest Act's definition of "Crown timber" and "Crown lands" not including timber on Aboriginal title lands, the SCC found that the Forest Act did not apply to the Tsilhqot'in's Aboriginal title lands. The SCC concluded that "the legislature intended the Forest Act to apply to land under claims for Aboriginal title up to the time title is confirmed by agreement or court order." However, once Aboriginal title is proven, the beneficial interest in the land, including its resources, belongs to the Aboriginal title holder.

On the question of whether provinces can legislate in relation to Aboriginal title and rights, or whether this amounts to an interference with a core area of federal jurisdiction under s. 91(24), the SCC held that the doctrine of inter-jurisdictional immunity did not apply.

The SCC reasoned that the inter-jurisdictional issue in this case was not one of competing provincial and federal powers but, rather, of addressing the tension between the rights of Aboriginal title holders to use their lands as they choose, and the authority of the Province to regulate land use. The SCC concluded that the guarantee of Aboriginal rights in s. 35 of the Constitution Act, 1982 operates as a limit on both federal and provincial legislative powers; therefore, the proper way to curtail interferences with Aboriginal rights and to ensure respect from Crown governments, is to require that all infringements, both federal and provincial, are justified.

MOVING FORWARD

This case provides First Nations with significantly improved opportunities to advance their Aboriginal title and rights in a manner that reflects their vision, values and perspectives. The SCC's decision essentially requires that the Crown and industry meaningfully engage with Aboriginal title holders when proposing to make decisions or conduct business on their territories. This engagement can no longer be limited to "small spots" but must be achieved with a view to tangibly addressing the incidents of title affirmed by this case; namely, the right of enjoyment and occupancy of title land; the right to possess title land; the right to economic benefits of title land; and the right to pro-actively use and manage title land. In this light, as the Court emphasized at para. 97 of its decision, the Crown and industry would be well advised to "avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."

Pragmatically speaking, this case provides sound guidance for effective and balanced consultation and accommodation discussions regarding decisions taken on Indigenous lands. The principles and laws affirmed in this case, once honoured and implemented, ought to re-invigorate negotiations in relation to the outstanding land question in British Columbia. Opportunities abound.

We acknowledge, with much gratitude and respect the vision, courage and leadership of the Tsilhqot'in people in advancing this case.

This case summary provides our general comments on the case discussed and should not be relied on as legal advice. If you have any questions about this case or any similar issue, please contact one of our lawyers. **[Reprinted courtesy of Mandell, Pinder LLP]**