

Canada: Indigenous Peoples' Inherent Title and Rights in British Columbia

Submission to the UN Committee on the Elimination of Racial Discrimination

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On behalf of the Union of British Columbia Indian Chiefs (UBCIC)

Introduction

The Union of British Columbia Indian Chiefs (UBCIC) mandate is to work towards the implementation, exercise and recognition of our inherent Title, Rights and Treaty Rights and to protect our Lands and Waters, through the exercise and implementation of our own laws and jurisdiction. The UBCIC strengthens Indigenous Nations to assert and implement their Aboriginal Title, Rights, Treaty Rights and Right of Self Determination as Peoples. The UBCIC works collectively amongst Indigenous Nations in BC and acts as an advocacy body to provide a cohesive voice (regionally, nationally and internally) in support of Indigenous Nations and communities, and to promote and protect each Nation's exercise of Sovereignty within their traditional territories.

The current Canadian government, led by Prime Minister Justin Trudeau, has committed to a new relationship with Indigenous peoples in Canada based on the "recognition of rights, respect, co-operation and partnership." This relationship would be "guided by the spirit and intent of the original treaty relationship; one that respects inherent rights, treaties and jurisdictions; and one that respects the decisions of our courts." A key aspect of this new relationship is the implementation of the *UN Declaration*, in "partnership with Indigenous communities."¹

Despite these lofty promises, we are presently witnessing a great divide between the words of the Canadian government and its actions on the ground. This submission highlights a number of examples where the rights of Indigenous Peoples are presently being violated, and many other issues are highlighted in the reports of other Indigenous Nations presenting to CERD. Throughout this submission, we would like to highlight the term "rights ritualism" for the consideration of the Committee in respect to Canada's present actions:

Rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses. Countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.²

The following report outlines a very few of the many pressing issues facing Indigenous Nations in British Columbia today, many of which have national and international ramifications. To avoid repetition for the Committee, we list at the end of this submission other submissions which we are supportive of on issues that are also of great concern to the Union of BC Indian Chiefs.

1. Indigenous Peoples' Inherent Title and Rights

(20) In light of its General Recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party, in consultation with Aboriginal peoples: [...] (b) Continue to seek in good faith agreements with Aboriginal peoples with regard to their lands and resources claims under culturally-sensitive judicial procedures, find means and ways to establish titles over their lands, and respect their treaty rights.

(CERD/C/CAN/CO/19-20, Concluding Observations March 2012)

¹ <http://pm.gc.ca/eng/news/2015/12/08/prime-minister-justin-trudeau-delivers-speech-assembly-first-nations-special-chiefs>

² <http://www.un.org/esa/socdev/unpfii/documents/EGM/2015/Experts-papers/Fleur-Adock.pdf>

We, Indigenous Peoples, were placed upon our territories by the Creator. As Indigenous Peoples, our identity is defined by our connections to our territories, to each other, to our neighbouring Nations, and to the other life we share our living world with. We are the original people of this land. We have the human right to survive as distinct Peoples, contributing to the global fabric of Nations into the future. Indigenous Peoples' Aboriginal Title to the Lands and Resources and our Right of Self-Determination remains strong and unbroken, and has never been addressed through any agreement with Canada. Canada's sovereignty is conditional upon Canada protecting Crown obligations to Indigenous Nations. Any Crown title or jurisdiction that Canada or the Province assert remains subject to unextinguished Aboriginal Title and Rights, and further subject to the terms – yet to be fully realized – of Nation-to-Nation treaties made with Indigenous Peoples.³

Canada must shift its exclusionary idea of sovereignty and federalism to one that is inclusive of Indigenous legal orders, Title and Rights, and Treaty Rights. Justice can only be achieved when Canada truly and meaningfully recognizes that Indigenous Nations form one of the historic and enduring levels of governance within this country.⁴

The British Columbia Treaty Commission Process (BCTC) is out of step with the established law and standards of *Tsilhqot'in Nation*⁵, the *UN Declaration on the Rights of Indigenous Peoples (the Declaration)*, and the CERD General Recommendation XXIII article 5.⁶ It is also inconsistent with commitments of the new Federal Government to establish new Nation-to-Nation relationships based on recognition of Aboriginal Title and Rights.⁷ Despite this, there have not yet been clear steps by the Federal Crown to address these flaws, including the limitations and infringements it imposes. The Federal Crown needs to take action – first by reforming the Federal Comprehensive Claims Policy to develop joint processes with Indigenous Peoples and, second, by ridding itself of the current limitations of the BCTC Process.⁸

Despite the failure of the BCTC Process to effect reconciliation over much of the Province, past Provincial governments have been unwilling to abandon it. The process continues to create a convenient vehicle for governments to maintain the appearance of taking action, even while it has not produced results for most First Nations and has been expensive and divisive.

2. Sustainable development

Sustainable development – as defined in international law – should prove highly beneficial to Indigenous Peoples. Yet sustainable development has largely not taken place, despite the severe and ongoing impacts of resource development in regard to Indigenous Peoples.

In regard to sustainable development in international law, the CERD should remind Canada of its international commitments “to end poverty and hunger everywhere; ... to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources”. All resource development projects should adhere to these critical elements.

³ Union of BC Indian Chiefs, Chiefs Council Resolution 2017-32: UBCIC Rejects Canada150

⁴ Excerpt from UBCIC Aboriginal Title and Rights and Treaty Rights Position Paper, original 1978, revised and endorsed 2014

⁵ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>;

http://www.firstpeopleslaw.com/database/files/library/Tsilhqotin_Nation_v_BC_Plain_Language.pdf

⁶ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7495&Lang=en

⁷ <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>

⁸ Union of BC Indian Chiefs, Memo and Political Legal Action Plan: Beyond the BCTC Process, September 2016

Poverty represents a denial of human rights and human dignity. As repeatedly stressed by the General Assembly, there is “the need to ensure that no one is left behind, including indigenous peoples, who will benefit from and participate in the implementation of the 2030 Agenda” for sustainable development. The impacts of poverty are interrelated and compounded by unsustainable development. In particular, Indigenous women and children that are deprived of their collective and individual right to security, cultural identity, adequate housing and other essential services face situations that enhance vulnerabilities. Such situations often result in violence against women and girls. Upholding and protecting the human rights of Indigenous peoples, including Treaty rights, is a matter of legal responsibility. States and corporations must be held accountable for ensuring that resource development does not violate these rights. In the context of sustainable development, CERD should remind Canada that Indigenous Peoples have the “right to determine and develop priorities and strategies for exercising their right to development” (*UN Declaration*, art. 23) and that Indigenous Peoples’ right to development is an integral part of their right to self-determination. Indigenous Peoples are entitled to benefit from, and make decisions concerning, their territories.⁹

3. Housing

First Nations experience disproportionately poor living conditions on- and off-reserve which remain well below the Canadian standard. The increasingly sub-standard, inadequate and overcrowded housing directly contributes to social breakdown, critical health problems, high rates of substance abuse and domestic violence. The right to housing is affirmed in the *UN Declaration*, article 23. Dr. James Anaya, then United Nations Special Rapporteur on the Rights of Indigenous Peoples, noted in July 2014 that housing in First Nation communities “[had] reached a crisis level.” UBCIC recognizes and objects to the ongoing, critically low levels of federal funding for First Nations housing and recognizes the devastating impacts that overcrowded and inadequate housing has on our communities. We urge the CERD to recommend to the Government of Canada and the Canada Mortgage and Housing Corporation to increase the allocated funds to the Section 95 On-Reserve Non-Profit Housing Program to an adequate and appropriate level and demand that the Government of Canada provide adequate funding for First Nations housing and infrastructure needs to address the crisis of increasingly sub-standard, inadequate and overcrowded on-reserve housing.¹⁰

4. Energy and Mines

(20) In light of its General Recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party, in consultation with Aboriginal peoples: (a) Implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards and the State party's legislation.
(CERD/C/CAN/CO/19-20, Concluding Observations March 2012)

Kinder Morgan

On November 29, 2016, the Canadian Federal Cabinet directed the National Energy Board to approve the Kinder Morgan Trans Mountain pipeline expansion. This pipeline poses an unacceptable risk to the health, safety and livelihoods of First Nations throughout British Columbia, and will contribute to the negative environmental and health impacts experienced by Indigenous Peoples downstream of the tar sands, and of all peoples throughout

⁹ UNPFII Joint Statement by the Coalition on the Human Rights of Indigenous Peoples on Sustainable Development, endorsed by UBCIC, April 2017

¹⁰ UBCIC Chiefs Council Resolution 2016-21: CMHC Section 95 Housing

the world as a result of accelerating global climate change. The Tsleil-Waututh, Squamish, Musqueam, Coldwater, Upper Nicola, Stk'emplupsemc te Secwepemc, Aithchelitz, Shxwhay Village, Yakweakwioose, Kwaw-kwaw-apilt, Tzeachten, Skowkale, Soowalie, and Squiala peoples have commenced legal proceedings seeking to challenge the federal approval for the Trans Mountain project on the basis that the Crown failed to adequately consult and accommodate them. It is well established that diluted bitumen contains toxic chemicals that are a threat to drinking water, health, and the well-being of salmon and other beings. The Supreme Court of Canada has held that the Crown's legislative power can and should be used to uphold its duties to Indigenous Peoples, and that both the federal and provincial governments have an obligation to uphold the honour of the Crown.¹¹

5. Forestry

British Columbia is Canada's largest producer of softwood lumber, accounting for approximately 55% of Canada's lumber exports to the US. Forestry activities in BC continue to impact First Nations' territories with little or no benefit to them. First Nations in BC are working to become active participants in the forest sector with access to approximately 12% of the provincial annual allowable cut. BC First Nations require access to markets to best ensure their forest tenure opportunities are economically viable. The issue at hand is the non-recognition of Indigenous Title and Rights which acts as a subsidy that is not included in ongoing discussions of softwood lumber agreements, but that should be provided to Indigenous Peoples whose resources are removed from their territorial lands.¹²

6. Languages

As stated in the report of the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, Indigenous languages form the bedrock of continuity for the survival and well-being of Indigenous cultures from one generation to the next. This important intergenerational responsibility has been severely disrupted by colonialism and colonial practices, laws, policies and practices of discrimination, assimilation, forced relocation and residential and boarding schools, among others. The province of BC contains the highest number of distinct languages and two thirds of the distinct languages in Canada resulting in immense diversity in relation to the state of language loss and each of their needs for recovery.

Canada is presently working on legislation concerning Indigenous languages, which is a welcome development, however this legislation must respect article 19 of the *UN Declaration*, as well as recognize that each Indigenous Nation is the only authority able to draft their own unique (*sui generis*) form of Language Law; and as such a Nation-to-Nation process is needed to: address the cultural and legal significance of ancestral domain in unceded territories; and to address the impact of a federal Indigenous Languages Act on each Indigenous Nation's Title and Rights. This Nation-to-Nation process must build First Nations' capacity to develop First Nations legal systems to pursue legal pluralism as well as advise and assist First Nations in drafting their respective positions, declarations and languages laws. The legislation that Canada is in the process of developing must be Nation and Treaty based; community driven; Elder focused; and family and youth centred.¹³

¹¹ Union of BC Indian Chiefs, Chiefs Council Resolution 2017-15: Protecting Water, Salmon and Health from Diluted Bitumen

¹² First Nations Forestry Council Briefing on Canada-US Softwood Lumber Negotiations, July 2016

¹³ Union of BC Indian Chiefs, Chiefs Council Resolution 2017-36: Indigenous Languages

The UBCIC supports the following submissions:

- Canada: Violence against Indigenous women and girls (Amnesty International - Canada)
- Canada: Indigenous rights violated by the Site C dam (Amnesty International - Canada)
- Canada: Implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (Coalition for the Human Rights of Indigenous Peoples)
- Canada: Northwest British Columbia Coastal Indigenous Groups (Liquefied Natural Gas developments)
- Canada: Indigenous Languages threatened by Canadian Assimilation Policies (Kontinonhstats – Mohawk Language Custodians Association)
- Canada: First Nations Child and Family Welfare (Amnesty International & First Nations Child and Family Caring Society)

Suggested Questions

1. Inherent Title and Rights: How does the Federal Government plan to take action to ensure that appropriate and effective mechanisms are in place to ensure that Indigenous Peoples' right to own, use, develop and exercise full control over their lands, territories and resources, is respected? How will the challenges associated with the Federal Comprehensive Claims Policy and the British Columbia Treaty Commission Process be addressed?
2. Sustainable Development: How does Canada intend to implement the Sustainable Development Goals in Canada with respect to the inherent Title and Rights of Indigenous Peoples, especially concerning the right to free, prior and informed consent in advance of any legislative measures that may affect them?
3. Housing: Will the Government of Canada and the Canada Mortgage and Housing Corporation increase allocated funds to the Section 95 On-Reserve Non-Profit Housing Program to an adequate and appropriate level and will the Government of Canada provide adequate funding for First Nations housing and infrastructure needs to address the crisis of increasingly sub-standard, inadequate and overcrowded on-reserve?
4. Energy and Mines: With respect to massive resource development projects such as the Site C Dam, the Kinder Morgan Expansion Project, and the Pacific NorthWest liquefied natural gas project, how does Canada intend to meaningfully recognize and respect the right of Indigenous Peoples to their free, prior and informed consent regarding the approval of any project affecting their lands or territories or other resources, especially through Indigenous Peoples' own representative institutions?
5. Forestry: Will BC First Nations be fully and meaningfully involved in negotiations to ensure Aboriginal Rights and Title interests are understood and incorporated in forestry agreements going forward? Will Indigenous Peoples be recognized, consulted, and compensated in regards to resources extracted from their traditional territories?
6. Languages: How will Canada recognize and address the cultural and legal significance of ancestral domain in unceded territories; and how will Canada meaningfully address the impact of a federal Indigenous Languages Act on each Indigenous Nation's Title and Rights?